IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939.

No. 1060 118

CHAIN O'MINES, INCORPORATED, A CORPORATION, ET AL.,

Petitioners,

vs.

UNITED GILPIN CORPORATION, A CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX

PAGE

CASES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Chain O'Mines, Incorporated, a corporation, and certain of its stockholders, by their attorneys, respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit to review a final judgment of that court rendered March 2, 1940, in above entitled cause (R. 1134). A transcript of the record in the case, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of the rules of this court. There is included in said proceedings and record, petitioners' petition for rehearing (R. 1147) and respondents' answer to same (R. 1175).

Summary Statement of Matter Involved.

This action involved the interpretation of a written contract between the petitioner, Chain O'Mines (plaintiff below) and the respondent (defendant below) L. M. Seeley providing for the acquisition through a sheriff's deed on execution, of large mining and ore milling properties in Colorado, then belonging to the plaintiff, and the execution by Seeley's assigns of a mortgage on the properties for $1,500,000. Seeley's assigns contracted to acquire the sheriff's deed title but did not execute the mortgage. He and two of his fellow-defendants, one of whom was a director of plaintiff corporation at the time of the contract, organized the respondent United Gilpin Corporation, which later acquired the title by independent contracts with the holders of the sheriff's deed.

The District Court interpreted the contract as requiring the said respondent corporation to execute and deliver the mortgage to the plaintiff, found Seeley, and his said two fellows guilty of conspiracy to defraud, and of fraud, and decreed restitution of the property to the plaintiff corporation by the respondent corporation without reimbursement of investment.

The Circuit Court of Appeals interpreted the contract as requiring Seeley's assigns to "float" a $1,500,000 mortgage, and with the proceeds, pay plaintiff's debts, and thereafter restore the property to the plaintiff. It reviewed the evidence, found the venture to have been unprofitable to respondents, and on that ground excused the giving of the mortgage, found them not guilty of fraud, and ordered the dismissal of the bill.

Basis of Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code of the United States as amended (28 U. S. C. A., 347).

A.

There are in this cause special and important reasons for this court's intervention.

B.

The Circuit Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

C.

The Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the weight of authority.

D.

The Circuit Court of Appeals has decided a question of local law in a way in conflict with applicable local decisions.

Ex parte Chetwood, 165 U. S. 443, 41 L. Ed. 782;
Forsyth v. *Hammond,* 166 U. S. 506, 41 L. Ed. 1095;
Montana Min. Co. v. *St. Louis & M. Co.,* 204 U. S. 204, 51 L. Ed. 444;
McClellan v. *Carlan,* 217 U. S. 268, 54 L. Ed. 762;
International Railway Co. v. *Davidson,* 257 U. S. 506, 66 L. Ed. 341;
Rorick v. *Devon Syndicate,* 307 U. S. 299, 83 L. Ed. 1303.

Questions Presented.

1. The right of the Circuit Court of Appeals to review the evidence and reverse the findings of fact of the District Court.

2. The interpretation of the aforesaid contract of June 19, 1934, and determination whether thereunder the question of the profitableness of the venture was material.

3. The right of a director of the plaintiff corporation to participate in a course of action whereby it was deprived of its assets without compensation.

Reasons Relied on for the Allowance of the Writ.

The discretionary power of this Court is invoked upon the following grounds:

1. The Circuit Court of Appeals for the Seventh Circuit has misapprehended and misconceived the findings of fact, conclusions of law and the decree of the District Court.

2. The Circuit Court of Appeals has misconstrued the language and the true intent and meaning and hence the legal effect of the contract of June 19, 1934, in evidence in this cause.

3. The Circuit Court of Appeals has misconceived the legal effect of the undisputed documentary exhibits and other evidence in the case.

4. The decision of the Circuit Court of Appeals herein is in conflict with a decision of the same Court (with different personnel) on the same question or matter herein involved.

5. The judgment of the Circuit Court of Appeals is contrary to the facts in evidence in this cause and the law applicable thereto.

6. The opinion and judgment of the Circuit Court of Appeals is contrary to equity, good conscience and justice.

7. The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings in that said Court reversed the findings of fact of the trial court based upon substantial evidence.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in the Circuit Court of Appeals had in this cause, to the end that said cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioners be granted such other and further relief as may seem proper.

FELIX J. STREYCKMANS,
Counsel for Petitioners.

JOHAN WAAGE,
LOUIS COHEN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Pursuant to order of the District Court, certain proceedings, including the Chancellor's oral decision, from the bench, had on March 1, 1938, were duly entered of record, on, to-wit, April 9, 1938. The following is part of such oral decision:

> "The Court: I have read the briefs in this case, gentlemen, and have examined the reports of findings of fact and conclusions of law which counsel have submitted. My mind is clear on some phases of the case; and on some other phases of the case it is not quite so clear.
>
> I am of the opinion that Messrs. Kremm and Schwerin practiced a fraud upon the Chain O'Mines Corporation and Stockholders. These two men were the two principal actors in that regard.
>
> Having observed them on the witness stand, I think probably Mr. Kremm did most of the leg-work, and that Mr. Schwerin did most of the thinking. I believe, however, they are equally guilty.
>
> The other defendants, including the corporate defendants, are merely the agents and instrumentalities of the principal defendants, Kremm and Schwerin. The other defendants are, I say, the instrumentalities and agents wherewith Kremm and Schwerin carried out their fraudulent design.
>
> The Chain O'Mines Corporation and its Stockholders were lulled into a sense of security by that contract of June 19. • • •

The fact that the contract was not signed by the holders of those judgments out in Colorado, does not, I think, prevent it from having the effect which I stated.

As a matter of fact, the holders of those judgments were brought into the scheme, not by their signatures to this particular contract, but by their signatures to other contracts, and the Chain O'Mines and the Stockholders should have had the benefit of those contracts.

Now, it is said the first corporation that was organized by Messrs. Kremm and Schwerin as an instrumentality for the perpetration of their fraudulent scheme, was not successful. I don't think that makes any difference. * * *

The mere fact that Kremm and Schwerin did not make as much money as they anticipated does not change the character of their acts; the mere fact that they had to do more work in and about their fraudulent scheme than anticipated; the mere fact that they had to organize a second corporation does not change the intent of their character or of their acts. The second corporation they caused to be organized has as much of the tint of fraudulent activity as did the first. * * *

There is one thing which I am not so clear about as yet, and in respect to that matter I desire further asistance of counsel. That matter is the form which the relief should take. * * *

Before I come to that, perhaps I should observe that apparently Mr. Schwerin relies upon the substantial inability of the plaintiffs to prove his knowledge of Mr. Kremm's holding the office of Director of the Chain O'Mines corporation at the time these fraudulent enterprises were entered upon. Now, I think that knowledge may be inferred from all the knowledge and

circumstances in the case, but I don't think it is necessary to do that. The evidence shows clearly that Mr. Seeley was Mr. Schwerin's agent, and Mr. Seeley attended a meeting of the Board of Directors of the Chain O'Mines Corporation at which Mr. Kremm was present and acting as a member of the board of directors. Mr. Seeley must have known and must have observed and must have known that Mr. Kremm was a director in Chain O'Mines Corporation. What he knew his principal Mr. Schwerin knew. However, I say I think the fact of the knowledge of Mr. Schwerin of Mr. Kremm's position may be inferred from all the facts and circumstances in the case." * * * (R. 1043-47.)

On April 9, 1938, the District Court made its findings of fact, stated its conclusions of law and entered its decree (R. 1054-90).

The opinion of the Circuit Court of Appeals (R. 1133) complained of, was filed January 26, 1940. A petition for rehearing, appropriately filed, was denied March 2, 1940 (R. 1189). Opinion is reported in 109 F. (2) 617.

STATEMENT OF THE CASE.

On November 23, 1937, petitioner, Chain O'Mines, Incorporated, a Nevada corporation, hereafter designated Chain O'Mines, together with fifty-five of its stockholders, filed its complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, against the respondents, alleging, in substance, that Georges F. Kremm, Louis M. Seeley and Charles L. Schwerin conspired and agreed together to, and did, unlawfully secure title and possession of the mining properties belonging to plaintiff, Chain O'Mines, located in Gilpin County, Colo-

rado; the complaint alleged in detail the successive overt acts in the conspiracy; the prayer asked for specific performance of contract of June 19, 1934; that in default of such performance, said contract be declared a first lien mortgage, and a foreclosure thereof; for a money decree for damages, injunction, receiver and other relief (R. 2-21). Prayer was subsequently amended asking a re-conveyance to Chain O'Mines, of all of its properties so complained of (R. 69). On March 11, 1938, prayer was again amended, praying that all of the properties subject matter of contract of June 19, 1934, be impressed with a constructive trust, with other relief, in favor of Chain O'Mines (R. 73).

All of the respondents filed their respective answers to the complaint on January 15, 1938 (R. 25-66).

The District Judge heard all of the evidence introduced at the trial without reference to a master.

The evidence adduced by petitioners on the trial of the cause showed that the conspirators sought to cheat and defraud Chain O'Mines out of its properties by means of the contract of June 19, 1934, divers transfers of a labor lien, a power lien, sundry tax deeds and suits to quiet title; that Georges F. Kremm, Louis M. Seeley and Charles L. Schwerin were the conspirators; that Georges F. Kremm, director of Chain O'Mines, became the first participant.

Lien of Edward H. Lewison.

March 17, 1934, a mechanic's lien judgment was entered in the District Court of Gilpin County, Colorado, in an action entitled, "Edward H. Lewison, assignee of 126 other labor claimants, as Plaintiff, and Public Service Company of Colorado, Cross Complainant, *vs.* Chain O'Mines, Incorporated, *et al.*," known as Case No. 5064, in the amount of approximately $100,000.00. This judgment immediately be-

came a first lien on the property of Chain O'Mines, located in Gilpin County, Colorado, and will hereafter be referred to as the labor and power liens (R. 867-898).

May 8, 1934 (R. 84), Georges F. Kremm was re-elected a director of Chain O'Mines. Kremm had previously, for a period of about three months during the early part of 1933, been a director (R. 212).

May 21, 1934, Georges F. Kremm went to Central City, Colorado and visited with Leroy J. Williams about the labor lien, and thereupon Williams agreed to settle, and ultimately sell and convey, the lien of Edward H. Lewison, whom he, the said Williams represented, to said Kremm (Plaintiffs' Ex. 10; R. 109).

On June 19, 1934 there came into being a proposed plan by Georges F. Kremm, whereby it was believed the stockholders and creditors of Chain O'Mines would be protected and their investments preserved (Plaintiffs' Ex. 9; R. 108).

At the meeting of the board of directors on June 19, 1934 (Plaintiffs' Ex. 8; R. 100), Georges F. Kremm submitted his plan (Plaintiffs' Ex. 9; R. 108). This plan provided, among other things, that the title and possession to the property of Chain O'Mines, located in Gilpin County, Colorado, and all of its equipment, would be acquired by Louis M. Seeley, the designated agent and representative of Charles L. Schwerin and Georges F. Kremm; that a corporation would immediately be formed by the said Louis M. Seeley, to take over the property of Chain O'Mines, through the medium of the labor and power lien aforesaid; that such corporation to be formed, at an appropriate time after its incorporation, would execute and deliver to a trustee to be agreed upon, a mortgage in the principal amount of $2,000,000.00, or the sum of $1,500,000.00 in the event that certain conditions of the plan had not been carried

out by Chain O'Mines, which said mortgage was intended for the benefit of Chain O'Mines, its stockholders and creditors; the plan further provided that interest would be paid on this mortgage; that said corporation when organized and operating would pay a royalty on all ores mined, such interest and royalty to be deposited with the trustee to be named, all for the benefit of Chain O'Mines.

After this special meeting of the board of directors of June 19, 1934 was called to order, in accordance with the waiver of notice above referred to, a discussion was had among the directors concerning the proposed plan by Kremm. It was observed that the proposed agreement contained the name of Louis M. Seeley instead of Georges F. Kremm, and the directors inquired as to who Seeley was. Thereupon, Kremm called his associate, Louis M. Seeley, into the meeting room. He introduced Seeley to the board of directors as his associate and in presenting Seeley he said he wanted him to meet his (Kremm's) associate members of the board. Presently Seeley retired from the room and Kremm delivered the ultimatum that the agreement would have to be signed "tonight," or not at all. At this meeting the board of directors, with respect to the affairs of Chain O'Mines, was in a desperate situation, and, there appearing no alternative, a resolution prepared and presented by Kremm was passed by the board, unanimously, authorizing the proper officers of the company to sign the agreement; whereupon, Seeley was recalled to the room where the meeting was being held and the contract of June 19, 1934 was signed (R. 107).

This contract of June 19, 1934 was subsequently and in due time ratified and confirmed by the voting trustees, representing more than two-thirds of the common stock of Chain O'Mines (Plaintiffs' Ex. 15; R. 134).

The evidence further showed that Charles L. Schwerin, one of the conspirators herein, prior to the meeting of June 19, 1934, insisted that Louis M. Seeley be designated in said contract as the party to acquire the properties of Chain O'Mines (R. 998).

Charles L. Schwerin, as the evidence showed, was the president and director of a number of corporations, engaged principally in the management of improved real estate in Chicago, Illinois and Milwaukee, Wisconsin, and apparently had more than the ordinary amount of business experience (R. 996).

July 23, 1934, one month and four days following the execution of the contract, Central City Gold Mines Company was organized under the laws of the State of Colorado (Plaintiffs' Ex. 29; R. 226). Immediately prior thereto, William M. Muchow, formerly president and now manager of a defaulted lessee, in possession, delivered possession of all of the property of Chain O'Mines, to Georges F. Kremm at Central City, Colorado. This was done pursuant to the terms of the contract of June 19, 1934 (R. 270-71).

On April 23, 1935, the Lewison contract was cancelled for default in payment. The date is important, the evidence showing that on April 22, 1935, in pursuance of instructions given by Charles L. Schwerin, Charles R. Enos, attorney for all of the parties named as conspirators herein (R. 929), together with his law partners as incorporators, organized the United Gilpin Corporation under the laws of the State of Colorado (Plaintiffs' Ex. 67; R. 488), with a capital stock of $350,000.00, divided into 350,000 shares of common stock at a par value of $1.00 each, to be issued as fully paid and non-assessable.

The evidence showed that shortly after this incorporation, Georges F. Kremm was elected a member of the board of directors, and its officers consisted of Charles L. Schwer-

in as president, Pages J. Thibodeaux, Jr., an employe of Beedee Management Company, as vice-president, L. O. Byron, also an employe of Beedee Management Company, as secretary, and L. M. Seeley, likewise an employe of Beedee Management Company, as treasurer (Plaintiffs' Ex. 68; R. 504). Subsequently, Kremm, according to the evidence, was elected chairman of the board of directors (Plaintiffs' Ex. 74; R. 805).

April 30, 1935, eight days after the incorporation of the United Gilpin Corporation, a new agreement was entered into by and between Edward H. Lewison and Leroy J. Williams, his attorney, with one A. S. Hurter, a clerk of Schwerin and in the employ of Beedee Management Company, under the terms of which the said Hurter contracted to purchase the same interest in the labor lien that was originally contracted for purchase by Kremm on May 21, 1934; that Hurter made a down payment of $1,500.00, amount in default by Central City Gold Mines Co., which money was furnished by Beedee Management Company (R. 1006). This agreement gave power to Hurter to take possession and operate the Chain O'Mines properties as long as the terms of the agreement were complied with (Plaintiffs' Ex. 74; R. 655). This deal was affected through Enos and Williams, attorneys for the respective parties. Williams never met Hurter (R. 929).

The following day, Hurter assigned said contract to United Gilpin Corporation, (Plaintiffs' Ex. 74; R. 659):

Thereupon, 340,000 shares of the common capital stock of the United Gilpin Corporation were issued, and note for $49,000.00 executed, as the evidence shows, to Hurter for the benefit of Charles L. Schwerin, Georges F. Kremm and Louis M. Seeley, and distributed, by designation of Schwerin, to divers persons and corporations without consideration (Plaintiffs' Ex. 74; R. 719).

Lien of Public Service Company of Colorado.

July 26, 1934, Central City Gold Mines Company, four days after its incorporation, agreed to buy, and Public Service Company agreed to sell, 33751/97226ths undivided interest in the Sheriff's certificate of sale issued in pursuance of the Lewison judgment, for $33,000.00, payable in Cities Service Power & Light Company 5½% Debentures, at par. This agreement was signed by George F. Kremm, as president of Central City Gold Mines Company, and by Louis M. Seeley as the secretary thereof (Plaintiffs' Ex. 74; R. 663).

April 30, 1935, following the incorporation of the United Gilpin Corporation, Central City Gold Mines Company assigned all of its right, title and interest in and to the aforesaid agreement, in consideration of the sum of Five Dollars, to Beedee Management Company. This assignment was signed by George F. Kremm as president of Central City Gold Mines Company, and by Louis M. Seeley as secretary thereof (Plaintiffs' Ex. 74; R. 674).

May 3, 1935, Beedee Management Company, by Charles L. Schwerin, president, and L. O. Byron, secretary, transferred and sold to the United Gilpin Corporation, by assignment, all of its right, title and interest in and to the agreement with the Public Service Company of Colorado, dated July 26, 1934, for 9,993 shares of the capital stock of United Gilpin Corporation (Plaintiffs' Ex. 74; R. 681).

The statement made by the officers and directors of United Gilpin Corporation to Securities and Exchange Commission, appearing in Plaintiffs' Exhibit 74, is as follows:

> • • • "Prior thereto, Central City Gold Mines Company had lost all of its right in this contract with

Edward H. Lewison, *et al.* by default, and by declaration of default by Edward H. Lewison, and prior thereto, likewise, Central City Gold Mines Co. had also lost any rights in the Public Service Company of Colorado contract by assignment, for a consideration, to Beedee Management Company, and ceased doing business. Not only was no going business acquired, but no consideration of any sort was paid to any party for any going business." (Plaintiffs' Ex. 74; R. 710.)

Tax Titles.

To further perfect their titles and more surely eliminate Chain O'Mines, the respondents caused their attorney in Colorado, Charles R. Enos, to acquire tax titles to the properties. This, notwithstanding their contract to pay taxes. (Plaintiffs' Ex. 9; R. 113). The titles(?) thus acquired were by mesne conveyances conveyed to United Gilpin Corporation (Plaintiffs' Ex. 56; R. 422); (Plaintiffs' Ex. 57; R. 426); (Plaintiffs' Ex. 58; R. 432).

Suits to Quiet Title.

Actions to quiet these titles against claims of Chain O'Mines were commenced but not prosecuted to judgment before the commencement of this action (Plaintiffs' Ex. 61, 62, 63; R. 446, 454, 458, 465, 477) when further prosecution was enjoined by the District Court herein.

Specification of Errors.

1. The Circuit Court of Appeals erred in its review of the evidence herein and in reversing the findings of fact of the District Court, based on substantial evidence.

2. The Circuit Court of Appeals erred in interpreting the contract of June 19, 1934 (R. 110-115) to contain an

agreement by the defendant Seeley to "float" a $2,000,000.00 mortgage, to acquire the labor and power lien therein described, and thereafter to restore plaintiff's property to it (R. 1137).

3. The Circuit Court of Appeals erred in basing its opinion and judgment in large part on the alleged fact that the operations by the defendant, United Gilpin Corporation, of the mining property involved were unprofitable (R. 1142).

4. The Circuit Court of Appeals erred in deciding that the local law of the State of Illinois requires that for the imposition of a constructive trust in this case the evidence of actual fraud be such as to preclude any other theory or explanation (R. 1141).

5. The Circuit Court of Appeals erred in reversing the decree of the District Court and ordering that the suit be dismissed.

SUMMARY OF ARGUMENT.

A consideration of all of the evidence in this record leads to the inevitable conclusion that Georges F. Kremm, Charles L. Schwerin and Louis M. Seeley, directly and through instrumentalities of Central City Gold Mines Co., United Gilpin Corporation, Beedee Management Company, L. O. Byron and A. S. Hurter, entered into and consummated a conspiracy to cheat and defraud Chain O'Mines, Incorporated, of its mining properties located in Gilpin county, Colorada, through the medium of the contract of June 19, 1934 and other contracts incidental thereto entered into for the acquisition of a labor and power lien Sheriff's certificate of sale from Edward H. Lewison and Public Service Company of Colorado, and by means of tax title deeds and suits to quiet title, as more fully set forth in the oral decision, from the bench, of the trial judge, and in the findings of fact and the record in this proceeding; that as a result of such conspiracy, said co-conspirators and their instrumental corporations did acquire and appropriate to their own use and gain all of the mining properties of Chain O'Mines, Incorporated, without having paid or rendered to it any compensation whatsoever therefor. That under such circumstances, said properties became impressed with a constructive trust in favor of Chain O'Mines, Incorporated, and that said corporation was and is entitled to the return of its properties.

ARGUMENT.

Misconception of Decree.

In its opinion, p. 620, the Circuit Court of Appeals uses the following language:

> "The District Court was of the firm belief that the three men (and incidentally the other defendants) had devised a fraudulent scheme whereby they would gain possession of the plaintiff's mines, and that they in fact mined ore greatly in excess of the value of $700,000 ~~$700.00~~ for which they should account. *The trial court interpreted the defendants' failure to float the $2,000,000 mortgage provided for by the June 19, 1934 contract as indicative of their intent to cheat the plaintiff after lulling the plaintiff and its stockholders into the belief that the acquisition of the labor and power lien certificate with defendants' funds was a temporary phase in the refinancing project, and that all its property would be restored to it upon the floating of this mortgage, which never occurred.*" (Italics ours.)

This is an obvious misconception of the findings of fact, conclusions of law and decree of the trial court.

There is not a word, sentence or paragraph to be found in the contract of June 19, 1934, the terms of which are substantially embodied in the findings, or in the entire findings of fact, conclusions of law or decree of the District Court that by the widest stretch of the imagination might be construed or interpreted to mean that that court assumed, indicated or found that defendants were to "*float*" a mortgage, or that there was a "*temporary*

phase'' or a *''refinancing project''* involved in the transaction, or that plaintiff's *''property would be restored to it upon the floating of this mortgage.''* (Italics ours.)

Assumptions of non-existent facts or findings cannot, of course, be made the basis upon which to predicate fraud —or anything.

The sale by plaintiff of the equity of redemption of its properties, under the terms of the contract of June 19, 1934 was absolute and final and was so found by the trial judge. The consideration provided was the execution and delivery to a trustee, for the benefit of Chain O'Mines, of a mortgage which was to be in the amount of $2,000,000 if there should be included in the transaction another group of mining claims known as California Hidden Treasure Mine, otherwise in the sum of $1,500,000, with provision for interest, royalty on tonnage milled, payment of taxes, etc. Obviously, default in performance of the covenants of the mortgage, when executed and delivered, alone, and a foreclosure in the usual manner would be the only method by which Chain O'Mines might have had its properties restored to it.

It is respectfully urged that this Court examine the findings of fact, conclusions of law and decree of the District Court (R. 1054-90) and as well the agreement between the parties (Plff's. Ex. 9, R. 108-15).

Contract and Facts.

In this connection we here quote briefly pertinent parts of agreement of June 19, 1934:

> ''* * * 1. L. M. Seeley agrees to purchase from Edward H. Lewison and the Public Service Company of Colorado, a corporation, all their right, title and interest in the property aforesaid under the following contract of purchase: * * * (R. 110).

3. L. M. Seeley agrees to assign to a proper corporation to be formed, all his right, title and interest in and to the property aforesaid, said assignment to said proposed corporation to be subject to the following conditions and limitations:

(a) The proposed corporation will *execute* a mortgage in the sum of Two Million Dollars ($2,000,000.00) with interest at the rate of one per cent (1%) per annum for two years, and four per cent (4%) per annum thereafter, for the balance of a twenty-five (25) year term, to the same escrow agent referred to in paragraph '2' hereof. The first year's interest to be paid one (1) year from the date of the execution of said mortgage, and quarterly thereafter.

(b) The mortgagor agrees to deposit with the trustee agent in escrow, in payment of accumulating interest and for the retirement of the principal sum of the above mortgage, the sum of five cents (5¢) per ton for all ore milled on the property above described by the said L. M. Seeley or his assigns during the first two (2) year period, and twenty cents (20¢) per ton thereafter. The proceeds of these tonnage payments *are to be paid* by the escrowee *to the order of Chain O'Mines, Incorporated,* as it accumulates, in multiples of One thousand and no/100 dollars ($1,000.00), to be placed in a sinking fund for the ultimate retirement of the principal, to be paid by the escrowee to the trustee in retirement of the principal of said mortgage, after current interest and a sum equal to the succeeding year's current interest is accumulated.

(c) Whenever there is a ninety (90) day default in the payment of interest due under the mortgage, the escrowee shall be empowered to *deliver to Chain*

O'Mines, Incorporated, title to the above mortgage, provided the mortgagee at that time is not in default of any of the provisions by it to be performed. * * *" (R. 110-11).

"6. Anything in this agreement to the contrary notwithstanding, the $2,000,000.00 mortgage to be executed, above referred to, shall be for $1,500,000.00 until there can be included in said mortgage, first by bill of sale from Sheriff or assignment thereof, and subsequently by deed or otherwise, good title to the property sold by Sheriff's sale, in accordance with the judgment of the California Hidden Treasures Mines Company, which sale took place between the dates of June 1st and June 15th, 1934, formerly the property of Chain O'Mines, Incorporated.

7. The tax delinquency clause in said mortgage shall provide that the mortgagor may be delinquent in any and all taxes to a date not later than ninety (90) days prior to the date of the last rights of redemption. * * * (R. 113).

9. L. M. Seeley, for himself and assigns, agrees that from time to time he or they will cause funds to be made available so that any interest other than the Public Service Corporation of Colorado or Edward H. Lewison may have in said Sheriff's Deed will be acquired and merged. * * * (R. 114).

13. L. M. Seeley and/or his assigns, and Chain O'Mines, Incorporated, agree that the escrow heretofore referred to shall, at the end of five (5) years, be dissolved, and the securities held by said escrowee shall be turned over to the parties as their interests may appear. * * * (R. 115).

At this point, a word about the agreement of June 19, 1934, from which we have first quoted.

It is to be noted that this instrument is silent in one of its aspects. That is with respect to the time within which, or *when* the mortgage provided for was to be executed and delivered. It should be known that Kremm prepared and presented this agreement. In Paragraph 3 it is provided that for the first two years the interest rate should be 1% per annum and the royalty rate 5¢ per ton, whereas, for the balance of the term of 25 years the interest rate was to be 4% per annum and the royalty or tonnage payments 20¢ per ton. This two year period of a light load—interest and royalty—closely coincides with the time provisions in the contracts made for purchase of the labor and power liens, about 19 months. But in order to clear up this sole equivocal element of the contract, we quote from testimony of Kremm wherein he relates a conversation between himself and his associate, Schwerin, pertaining to this subject:

> * * * "When I first discussed the agreement with him (Schuwerin), I don't think it was quite in its final form. When it was in its final form it was shown to him and I discussed it with him. He read it. * * *
>
> "We propose, as you see by this agreement, to certify the sheriff's purchase certificates, or sheriff's sale certificates', I think I called them 'with the first payment of five thousand dollars.' * * * 'The real important thing and the only thing of value that I see in that property is the right to operate it free of any harassment.' I told him in the preparation of this agreement I tried to eliminate, or effect a plan that might leave the door open for the harassment of the old creditors of the Chain O'Mines. * * * I said, of course, as this agreement sets forth, the Williams one, or Lewison one would cost ultimately $48,500, if we were punctual in our payments, and the Public Service

one I did not yet know, but I was of the belief, from the discussions I had had with them, that when our capital was in shape we would be able to deal with them for somewhere about 60% of the face of their certificate, and the face of their certificate I think was about thirty-two or three thousand dollars. * * * I said, 'Now, we have got about nineteen months in which to acquire these purchase certificates. At the end of that nineteen months we will certainly know by that time whether we have got anything to chew on here.' I said, 'If out of the operation of this property we have been able to pay the sixty-five or seventy thousand dollars involved in these purchase certificates, then it is time enough to begin to think of the plans of that mortgage.' I said, 'I don't care. That mortgage calls for $2,000,000 on that contract,—called for $2,000,000 on the mortgage, and under certain circumstances, for a million and a half dollars. It is due in 25 years. * * *' I told him this, moreover, that 'Of course, you have not a hazard. You got what I consider to be a business man's hazards. The possibilities of profit I think are very large, and I think that the hazard,—ratio of hazard to the possibilities of profit is small' '' * * * (R. 959-60).

We respectfully beg the court's pardon for burdening it with this lengthy quotation from the record, but it should be remembered that this testimony was given by Kremm at the hearing of this case as to vital events concerning the lawsuit which had happened about four years previously. Naturally, the gist of the action was: *The agreement of June 19, 1934 and the Mortgage provided therein.* And Kremm is here presumably giving testimony in support of *some defense theory.* In any event, it would appear from this testimony, that except for a small cash

capital investment, Kremm had planned, from proceeds of operation of the mining properties, within a period of less than two years to pay and liquidate the labor and power lien to Edward H. Lewison and Public Service Company, and, moreover, to provide for interest, taxes and all other charges on the properties, and, royalty reserves to retire, within the 25 year period, the entire $1,500,000 mortgage indebtedness. Hence it would appear the plan originally in Kremm's mind contemplated awaiting until liquidation of labor and power lien—less than two years—and acquiring full legal title, before executing the mortgage provided for in the contract.

Just when the idea first entered Kremm's mind, assented to and joined in by his co-conspirators, to defraud Chain O'Mines of its properties, without paying any compensation therefor, of course, no outsider knows; nor does it make any difference in this lawsuit. But it was effectuated. And the contract was so skillfully and equivocally drawn on the point of the time within which mortgage was to be given, that there would be ample time for the conspirators to decide what form their dishonest manipulations with respect to Chain O'Mines properties should take.

But to further analyze the opinion of the Circuit Court of Appeals with respect to the facts discussed. The learned judge who wrote the opinion, on page 623, says:

> "Defendants found the operation of the mines, loaded with a heavy past due mortgage and large labor and power liens, which were not only pressing but insistent, quite like plaintiff's experiences—sad and disappointing. The deeper they got in, the worse off they became. Yet the sum total of these operations resulted in the postponement of the liens and mortgage execution which meant a longer time for plain-

tiff and its stockholders to raise the money with which they might reclaim the property. The latter seemed, however, not disposed to venture more but to 'stand by' and participate in the profits if success crowned the defendants' efforts."

There is no foundation in the record for any of these statements.

The mines were not loaded with a past due mortgage. That mortgage had been eliminated by the decree in the foreclosure of the labor and power liens (R. 893).

The labor and power liens were pressing only in accordance with the contract in which defendants had agreed to acquire them (R. 110).

The mining operations were profitable. In Registration Statement filed with Securities and Exchange Commission on behalf of United Gilpin Corporation, by Messrs. Kremm, Schwerin and Seeley, as directors and officers, the following facts appear: From July 25, 1934 to December 31, 1934, the profits were $1,512.22 (R. 824); from February 1, 1935 to April 30, 1935, $22,178.48 (R. 825); from May 1, 1935 to April 30, 1936 $36,781.00 (R. 815); from May 1, 1936 to April 30, 1937, $28,834.90 (R. 815). The last two years' net profit were carried to Earned Surplus (R. 815).

The operations did not postpone any mortgage execution.

The liens had been foreclosed and defendants had agreed to acquire title through the foreclosure, without any agreement by which Chain O'Mines could reclaim the property.

The stockholders could not "stand by" or under any circumstances participate in profits. They had parted with

their equity. Their only possibility of remuneration lay in the payment of the mortgage agreed to be given their corporation.

It will thus be observed that this second corporation organized by Messrs. Schwerin, Kremm and Seeley to take over these properties did not fare so badly as the opinion of the Circuit Court of Appeals indicated, for, as we have seen, the net earned surplus for the period from May 1, 1935 to April 30, 1937 was $65,615.90.

In the succeeding paragraph, the opinion continues:

> "It is true there is some testimony that Kremm agreed to *float* a two million dollar mortgage and failed to do so. Moreover, he failed to sell the property to 'an English syndicate' and he utilized moving pictures and incurred expenses in endeavoring so to do. Such efforts, though futile, do not evidence fraud as much as they do good faith. Endeavoring, and even agreeing to raise two million dollars on a gold mine property is one thing. Actually raising the money, especially in the thirties, was a vastly different matter." (Italics ours.)

We are mystified. There is nowhere in the record in this case the slightest testimony or evidence that Kremm or anyone else agreed to "**float**" a two million dollar mortgage; the contract of June 19, 1934, did not so provide. Nor is there anywhere any mention that he "failed to sell the property to 'an English syndicate' and he utilized moving pictures and incurred expenses in endeavoring to do so." Perhaps the court was confused by the fact that Kremm served upon the board of directors of Chain O'Mines on two distinct occasions and for two separate periods. Kremm, in his testimony fixed February, 1933 as the month when he was elected the first time

and then served less than three months or until about the middle of May, 1933 when he resigned and had no further connection with Chain O'Mines for many months (R. 937). Prior to this first period, as shown by his testimony, in the latter part of the year 1932, he was told by the then president, Dr. Muchow, that if he would arrange for the sale of the property for one and a half millions dollars he would pay Kremm a 10% commission, and gave him a letter to that effect. Also that he was told where the property was and that it consisted of about 1100 claims and a 2,000 ton mill; that he was shown a number of still pictures, and at or about that time was shown a moving picture of the operation by someone from Burton Holmes office. That was either in the latter part of November or the early part of December, 1932 (R. 933). The attempted sale by Kremm to an English syndicate, or others, occurred, according to his testimony, in the latter part of the year 1932 under the 10% commission arrangement. But nothing happened (R. 934). There thus is evidence in the record that Kremm was shown moving pictures of Chain O'Mines operations, but none whatever, as assumed by the court's opinion, that Kremm "utilized moving pictures and incurred expenses in endeavoring so to do."

Misconstruction of Law.

This court's attention is now directed to that part of the opinion which seeks to state the law applicable to fraud, actual, willful and malicious, or, passive, implied, or purely legal and constructive.

In this connection, after summarizing the conclusions of law of the District Court, the opinion states:

> "We direct our attention first to that provision of the decree ordering a conveyance of the property in-

volved to the plaintiff, 'without indemnity, reimbursement or credit * * * for loans, contributions, advances, and for debts and liabilities incurred by said defendants.' Is this conclusion justifiable?"

And thereupon the opinion proceeds in (1, 2) to state the law applicable to a trust *ex maleficio,* concluding:

* * * "A trustee *ex maleficio* may not profit from his wrongdoing, but equity will not penalize him for contributions which are really for the benefit of the *cestui.*" * * *

To sustain this interpretation of the law, the opinion quotes from Vol. 1, Section 158, of the Restatement of the Law of Restitution, together with the comment thereon, and as well from Section 177. This, of course, is good law when applied to the ordinary constructive trust based upon the ordinary legal fraud. But it will be observed that in comment referred to, this qualification appears:

* * * "*Thus, in the absence of extraordinary circumstances, requiring the imposition of a penalty,* if a person by fraud obtains title to land subject to a mortgage and pays the mortgage, he is entitled to compensation for such payment upon being required to surrender the land."

Here we have the distinction between the ordinary, perhaps more or less innocent constructive fraud imposed by law for various reasons, and the *extraordinary,* actual, deliberate, willful, malicious fraud—fraud *ex maleficio.* (Italics ours.)

We supplement comment on Section 177 quoted in opinion:

"Where the property was transferred to him by mistake he cannot be compelled to surrender the prop-

erty unless he is reimbursed for the amount of his expenditure. On the other hand, *where he obtained the property by fraud, he is ordinarily not entitled to any reimbursement for improvements made by him.*" (Italics ours.)

The opinion thereupon goes on to state:

"The decisions of the Supreme Court of the State of Illinois, the forum of this cause of action, are in entire accord with the rule of law contained in the above announcement. In the case of *Feeney* v. *Runyan*, 316 Ill. 246, 147 N. E. 114, it was held:

> Where deeds are set aside because of fraud arising out of a fiduciary relation which the grantee sustained to the grantor, the decree should credit the grantee with any cash payment made at the time of the transaction and with principal and interest subsequently paid on notes given for the deeds and the notes should be directed to be returned to him, but he is not entitled to recover interest paid on the sums paid in cash.

"See also, *Lawson* v. *Hunt*, 153 Ill. 232, 38 N. E. 629, and *Pope* v. *Dapray*, 176 Ill. 478, 52 N. E. 58."

This quotation is taken from the syllabus, a composition of the official reporter and is not the decision of the court. In that case the court held, that the trust involved was that of a trustee *in invitum*, and has reference to constructive fraud only.

The two Illinois authorities cited in the opinion immediately following the above are likewise of the same character of constructive fraud indicated in the decision which the opinion sought to quote.

And thereupon the Appeals Court goes on to say:

> "Passing the ruling of the trial court directing reconveyance of the properties without reimbursement, we are earnestly urged to review the evidence upon which the finding of fraud is based.
>
> "Defendants argue that the evidence fails to disclose fraud, or, stated in another way, all the transactions disclosed by the evidence are equally explainable on the hypothesis of legitimate and innocent motives as on the theory of fraudulent motives.
>
> "(3) The rule of the Illinois Supreme Court stated in *Rubin* v. *Midlinsky,* 321 Ill. 436, 152 N. E. 217, 219, is that a constructive trust will not be imposed except where the proof of fraud is 'clear and convincing and so strong, unequivocal, and unmistakable as to lead but to one conclusion. * * * If the explanation of the evidence may be made upon theories other than the existence of a constructive trust, such evidence is not sufficient to support a decree declaring and enforcing such trust.' "

The foregoing quotation of the Illinois rule as stated in the decision cited, is an emasculation. This is what the Court said:

> "While counsel do not clearly state the character of trust which they contend exists here, we gather that it is sought to establish a constructive trust. While such trust may be established by *parol* testimony, the proof must be clear and convincing," etc. * * * (Italics ours.)

It will thus be seen that the Appeals Court in its opinion *deleted* the essential word *"parol"* and applied the decision generally without the qualification.

In a well considered case in bankruptcy, by Judge Lindley, construing local Illinois law, with respect to the different kinds of fraud, (25 F. (2nd) 211), the Court said:

> [2, 3] * * * "Gross disparity between the consideration paid and the actual value of the property has long been considered a badge of fraud, and, if it is so gross as to justify the inference of actual fraud, a chancellor may refuse to reimburse the grantee. If the grantee participates in the fraud perpetrated upon creditors, has guilty knowledge thereof, or intends to make possible such a fraud, then the transfer becomes void without any reimbursement. See *Biggins* v. *Lambert,* 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238. If, however, the transfer is set aside solely upon the ground that it is, so far as the grantee is concerned, one constructively fraudulent as to creditors, it will be upheld to the extent of the actual consideration, and vacated only as to the inadequacy. See *Beidler* v. *Crane,* 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349. * * *
>
> "What inadequacy of consideration will amount to constructive fraud is a question to be answered from a consideration of all of the circumstances of the particular case (citing Illinois authorities). (See also, *Whitney* v. *Roberts,* 22 Ill. 381.)
>
> "The ground of each of the decisions is well stated by the Supreme Court in the last-mentioned case, (*Nelson & Co.* v. *Leiter,* 190 Ill. 414, 60 N. E. 851, 83 Am. Rep. 142) as follows: 'A conveyance of property may be deemed fraudulent as against creditors upon two distinct grounds: First, where the conveyance is entered into with the fraudulent intent to hinder and delay creditors; second, where, from the terms of the agreement for the conveyance or the nature of the

transaction, the conveyance is declared fraudulent as a conclusive presumption of law, without regard to the real motives or purposes of the debtor. In the first class of cases the fraudulent intent is always a question of fact to be established by extrinsic proof. In the latter the conveyance is denounced as fraudulent as a legal inference, though the parties may not have been moved by any real design to hinder, delay, or defraud the creditor. * * *' "

In the case now before this court, under the agreement of June 19, 1934, the value of the properties was fixed by all concerned at $1,500,000 over and above the liens, admittedly less than $100,000, and whether the fraud which resulted in Chain O' Mines losing its corporate assets was actual, willful and malicious, as found by the Chancellor, or merely the ordinary constructive or legal fraud, the beneficiaries of the transaction, under Illinois law, were bound to at least account for and pay the difference of the consideration over and above the liens discharged, or reconvey the properties.

The Appeals Court, in reversing the District Court, approved the confiscation of Chain O' Mines' properties by respondents, wholly without consideration.

The Circuit Court of Appeals has thus decided a question of local law in a way conflicting with applicable local decisions.

Conflict With Another Decision of Circuit Court of Appeals.

The opinion herein is in conflict with another decision by the same court on the same question. *In re Country Club Building Corporation* (C. C. A., 7th), 91 Fed. (2d) 713.

The Fraud.

Now, with respect to the conspiracy charged and found to exist by the District Court, we direct the court's attention to the case of *The People* v. *Small*, 319 Ill. 437, wherein Len Small, late Governor of Illinois, with certain associates, was charged, while State Treasurer of Illinois, with having entered into and consummated a conspiracy to defraud the State out of public moneys in his charge. In an exhaustive opinion, the court on page 448, said:

> "The bill alleges and the decree finds that Small and the Curtises entered into an unlawful confederacy to use the public moneys for their private gain. In order to support this allegation and finding it is essential that the conspiracy be established by the evidence, but it is not necessary to prove that the co-conspirators came together and actually agreed, in terms, to pursue their common design by common means. If it is proven that the co-conspirators pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view of attainment of the same object, the natural deduction from this proof is that they were engaged in a conspiracy to effect that object. (Citing authorities) "*A conspiracy may generally be inferred from circumstances.* It is seldom that any one act, taken by itself, will establish a conspiracy, but when taken in connection with other acts, it may appear clearly that the series of wrongful acts result from concerted and associated action. Considered separately the acts of a conspiracy are rarely of an unequivocally guilty character, and they can be properly estimated only when connected with all the surrounding circumstances.

Where a conspiracy is once established, every act and declaration of each member in furtherance of the common design is in contemplation of law the act and declaration of all the members and is therefore original evidence against each of them. (Authorities)'' (Italics ours.)

A detailed succinct chronological story of the several steps by which this fraud was accomplished, is found in Insert No. 3 of respondents' registration statement filed with Securities and Exchange Commission (Plffs'. Ex. 74, R. 638) to which we invite particular attention.

Review of Evidence.

We respectfully submit that the Court of Appeals has departed from the accepted, usual and familiar rule of judicial proceeding by reversing the findings of fact of the District Court made upon substantial evidence.

We also submit that the series of steps detailed in respondents' registration statement (Ex. 74, *supra*) coupled with 148 pages of oral testimony, (R. 80-81, 84, 106-108, 130-133, 142-143, 195-198, 200-209, 212-215, 260-262, 269-272, 289-292, 369-376, 899-903, 906-907, 99-970, 972-974, 976-1009, 1020-1042) much of it conflicting, amply suffice to support the findings of the Chancellor. By the simple process of wrecking the first corporation, Central City Gold Mines Co., respondent, which held the contracts for the labor and power liens and the formation of a new corporation, United Gilpin Corporation, respondent, and through its medium procuring the same title, Schwerin, Kremm and Seeley acquired the whole equity in the properties, for which Chain O' Mines received no consideration whatever.

The words of Mr. Justice Holmes in *Adamson* v. *Gilliand*, 242 U. S. 350; 61 L. Ed. 356, an injunction case, are applicable here:

> "* * * The case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."
>
> *Davis* v. *Schwartz*, 155 U. S. 631; 39 L. Ed. 289-291.

CONCLUSION.

We respectfully submit that under any aspect of the case the pleadings and the evidence state a cause of action, and had the Court of Appeals decided that the fraud found by the Chancellor did not warrant a decree ordering conveyance to Chain O'Mines "without indemnity, reimbursement or credit * * * for loans, contributions, advances, and for debts and liabilities incurred by said defendants," that Court should have made its own equitable judgment, or directed the District Court to modify its decree instead of closing the door of Chain O'Mines and its stockholders against any further relief.

It is urged that the petition be granted.

Respectfully submitted,

FELIX J. STREYCKMANS,
Counsel for Petitioners.

JOHAN WAAGE,
LOUIS COHEN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 118

CHAIN O'MINES, INCORPORATED,
A CORPORATION, ET AL.,
Petitioners,

vs.

UNITED GILPIN CORPORATION, A CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY OF PETITIONERS FOR WRIT OF CERTIORARI TO ANSWER OF RESPONDENTS THERETO.

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INDEX.

PAGE

Table of Cases Cited.

PAGE

TABLE OF CASES CITED (continued).

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In presenting the petitioners' petition for a writ of certiorari herein, we were, of course, aware of the fact that

where the appellate tribunal has reversed the trial court, especially when the record is voluminous, as in this case, and facts as well as law are interwoven and involved, the laboring oars are in the hands of petitioners.

The rules of this court, however, rigidly limit contents and scope of petition and brief supporting same, hence the brevity of statement of the case and argument contained in our brief—a total of 35 pages.

Respondents have seen fit to file an elaborate answer and brief to our petition and brief—embracing 47 pages, and we now feel free to make a short reply to the substance thereof.

In their answer to our petition, respondents concede the jurisdiction of the court to *entertain* the petition in this case, but contend that such jurisdiction should not be exercised here.

We meet the issue raised and hasten to emphatically assert that petitioners are not seeking "another hearing" as claimed by respondents, allegedly supported by a decision of this court denying certain motions for suspension of mandate of an Appeals Court, not at all in point. With respect to other citations of authorities as to why the court should not *exercise* its jurisdiction and grant the petition for certiorari, none are controlling and we shall content ourselves by observing that the court itself is peculiarly familiar with its discretionary powers and decisions rendered in that behalf and will take judicial notice thereof.

The petition for a writ of certiorari in this case must stand or fall upon the principles of the rights or wrongs involved and will be measured by the standard of justice applicable.

Petitioners firmly urge that the *strange,* confusing, incomprehensible, unintelligible and inexplicable opinion and

decision of the Circuit Court of Appeals for the Seventh Circuit is inequitable, unconscionable and erroneous and must be reviewed in the interest of public morality and justice.

We at this point again invite the Court's perusal of the Chancellor's oral decision from the bench following the hearing and while he had all of the facts adduced at the trial freshly in mind, together with the findings of fact, conclusions of law and decree subsequently entered, including the terms of the vital and all important contract of June 19, 1934, entered into between the parties, and as well to a close scrutiny of the opinion of the Appeals Court, in order that this Court may have a clear understanding of the facts involved.

With this end in view, petitioners strongly contend that the Appeals Court misconceived and misinterpreted the findings of fact, conclusions of law and decree of the District Court, misapprehended general and local law applicable, misconstrued the plain terms, language and intent of the contract, injected wholly new and foreign elements therein and finally disposed of this solemn agreement between the parties involving an executed undertaking providing a $1,500,000 consideration by treating it as a "scrap of paper."

What were the facts that under the guidance of the trusted Director, Kremm, finally culminated in the contract of June 19, 1934? On May 22, 1934, under a judgment in a mechanics lien labor and power suit, a judicial sale was effected relative to the property herein and sheriff's certificate of sale issued to the two lienors therein. The total amount involved aggregated a little over $97,000. All other creditors of Chain O'Mines, including holders of bonds under a $300,000 bond issue, secured by deed of trust on the property, became subordinated to this judg-

ment and sale and could protect themselves only by means of becoming judgment creditors and redeem in the usual way. The redemption period for Chain O'Mines under the laws of Colorado would expire on November 22, 1934. And thereupon, Director Kremm, who had been re-elected to the Board on May 8, 1934, in an alleged endeavor to assist the corporation in solving its financial difficulties, having procured options and terms for the purchase by himself of the sheriff's certificate, negotiated the agreement which provided a sale to L. M. Seeley, associate and agent of Kremm and Charles L. Schwerin, of the equity of redemption of Chain O'Mines, Incorporated, in and to the properties affected, for a stated consideration of $1,500,000 over and above the face of the certificate of sale. The directors and stockholders of Chain O'Mines thereby felt themselves relieved of further worry and responsibility with respect to the sale or redemption therefrom, although more than five months of the redemption period still remained unexpired.

At page 26 of our petition, we quote part of opinion of the Appeals Court, indicative of that Court's disregard and contempt for the contract of June 19. Here we shall supplement same by a further brief quotation from paragraph (4) p. 622, 109 Fed. Rep. as follows:

> "Little may be gained by reciting in detail all the evidence upon which we predicate our conclusion that the evidence does not establish fraud. Suffice it to say that when these defendants came into the picture, the plaintiff, Chain O'Mines, was about to sink—unable to raise the money necessary to satisfy liens which were about to result in the sale of the property."

And in the next paragraph (4):

> * * * "The enforcement of these liens had proceeded so far as to result in a public sale and the issuance of a sheriff's certificate."

And again in the following paragraph (4):

> • • • "Had Kremm not negotiated the contract for the sale of lienor's interest, and secured the down payment of $5,000 from his associate, Schwerin, an officer of BeeDee Management Company, it is reasonably clear that plaintiff would have failed to raise the necessary funds, and then and there would have lost the property." • • •

Now, in the light of the contract of June 19, the all in all in this law suit, the language above quoted just does not make any sense at all. Nor does any of the language of the opinion, to our minds, in view of the record, make any sense.

We respectfully concede that the record discloses that the stockholders had been shown to be extremely reluctant, if not absolutely unwilling or unable to make further investments, but that did not justify the statements that "Chain O'Mines was about to sink" or that it "would have failed to raise the necessary funds, and then and there would have lost the property." It will be remembered that on June 19, the date of the contract, five months and three days of the statutory redemption period still remained. These assumptions and statements of the Appeals Court, are, we submit unfounded and unjustifiable speculations and such as no member of any court sitting at *nisi prius* would permit any witness to indulge. What would or might have happened in those five months it is obviously impossible for any man to say. What did happen is absolutely certain. The directors and stockholders were not only interested in liquidating the labor and power lien; that was a comparatively small item. They were vitally interested in the some $1,800,000 stock investments of more than 1100 stockholders, and the payment of debts to their other credi-

tors. However, when defendants agreed to pay off the lien claims and give a mortgage for $1,500,000 for Chain O'Mines' equity, the directors and stockholders accepted the contract offered by their trusted fellow director, Kremm, in good faith, and were lulled into the belief that further efforts to raise money or to redeem was not only unnecessary, but contractually improper.

But if, for the sake of argument, it be admitted that the plight of Chain O'Mines was as desperate as the opinion states, does that justify "scrapping" the contract? May it be said that one can be legitimately defrauded of his property because there is reason to believe that he is about to lose it to another and that human society is like a pack of wolves where one in distress may be devoured by his fellows?

An analogy to this line of reasoning may be cited. Recent events in world affairs have shown that certain weak and defenceless sovereign nations were relying upon solemn contracts, designated treaties, for their protection against assaults and invasions, when suddenly, on the pretense that a certain Democratic Power was about to violate the integrity of such nations, a would be World Dictator promptly "scrapped" and ignored his contractual obligations, ruthlessly applied the law of the jungle, invaded, took over, slaughtered and enslaved the free peoples of those trusting nations and confiscated their belongings.

In another part of the Appeal Court's opinion, on p. 623, discussing the benevolent course of defendants toward plaintiffs in connection with alleged facts and acts, which were wholly non-existent and not based upon anything contained in the record, it is said: * * * "Such efforts, though futile, do not evidence fraud as much as they do good faith."

Good faith, honesty of purpose and a protectorate for their own good was claimed by the actor to the drama above referred to. The results in both cases were similar. By the judgment of the Appeals Court, vetoing and nullifying the trial Chancellor's judgment, sanction was given to the appropriation and confiscation of Chain O'Mines and its stockholders properties by the despoilers, Kremm, Schwerin and Seeley without compensation. By the law of might, the weak and trusting peoples of the small democracies had their properties confiscated and appropriated, and, moreover, will lose their liberties unless a reversal of the Dictator's "good faith" exploits is affected.

Now, the vital issue involved here is this: Was the Chancellor right in his findings, conclusions and judgment or was he wrong.

We confess great reverence for the beneficence of equity jurisprudence. As is well known, it arose and developed with the dawn of civilization in England. Its origin rested upon religious precepts and was based upon the assumption that the King ruled his people by Divine Providence and could do no wrong; hence any citizen who fancied himself wronged and was without remedy under the rigid rules of the common law, could petition his King for redress. An accumulation of such petitions gave rise to the creation and establishment of the High Court of Chancery and the King's Chancellor became the keeper of the "King's Conscience" for the righting of all wrongs not cognizable under the common law. Our equity jurisprudence is inherited from the English system and our Chancellors' Consciences substituted. A solemn responsibility thus devolves upon our Chancellors, and their findings, decisions and judgments are not lightly vetoed. Rule 52 of the Rules of Civil Procedure promulgated by the Supreme Court of

the United States recognizes the sacredness of Chancellors' judgments in the following language:

> * * * "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." * * *

The substance of the above rule is incorporated in the legal set up and recognized by the courts of last resort in every state in the union.

And there is a fundamental and substantial reason for the application of the rule aside from the solemn import attaching to the motivating operation of the Chancellor's Conscience to observe the Divine Law and declare and decree truth, right and justice. It is this: Time is a healer of wounds; it also absorbs shocks and modifies opinions and judgments. It is difficult, historically, for the present generation to conceive the impressions stamped upon the minds and consciences of the eyewitnesses to the Supreme Tragedy enacted on Calvary. But to mention a very recent instance: The impression upon the minds and consciousness of eyewitnesses to the ravages of Poland will be tempered, shaded and shrouded in mists to the perceptions of the contemporary and future students of history as to these events and may be recorded and in cold type accepted as valiant exploits of a heroic conqueror bent upon the establishment of a new and better order of human life and society, rather than the ready acceptance of the stern truth of an unprovoked attack and the indiscriminate wholesale murders of innocent humans by an insane, evil, power loving assassin who long since should have been isolated, quarantined and eliminated.

And so, the Chancellor who saw, heard and observed the witnesses in this case—the principals and active factors

to the controversy—received and scanned all of the evidence introduced, motivated by his conscience and the firm resolve: "I will betroth Thee unto me forever, in righteousness, and in judgment," and guided by the application of his mental, intellectual and rational reasoning faculties, was peculiarly able to judge the rights and the wrongs and establish and declare the truth and thus render righteous judgment.

The extended alleged statement of the case and summary of facts contained in brief and argument of respondents, embracing some 25 printed pages thereof, presumably intended to bolster up the opinion of the Appeals Court, should convince this court of the necessity of granting the writ of certiorari and thus affording a review of the case.

But this so-called statement and summary is so wholly inaccurate, irrelevant, argumentative, confusing and self-serving that we shall make no further comment thereon, except to observe that in our petition for writ of certiorari we submitted a "statement of the case" citing briefly ample evidentiary facts in support of findings and decree of the Chancellor.

On page 38 of answer, designated reply to argument, it is stated:

> "* * * The parties never went through with the contract. The Chain O'Mines abandoned the contract and gave it up for lost in 1934."

These assertions and the entire paragraph of which they are the concluding part are altogether untrue and are not based upon any evidence in the record whatsoever.

And again, on page 40 it is said:

> "(c) Petitioners err when they state that the mining operations were profitable." * * *

Of course, there is no evidence supporting that assumption. In our petition for the writ we submitted respondents' own figures of yearly profit from their operations, carried forward to "earned surplus" taken from their Registration Statement filed with Security and Exchange Commission, in evidence.

On page 43 the following amazing statement appears:

> "The Chain O'Mines lost its property because it was financially destroyed, prior to the entry of the respondents into the operations." * * *

This again is utterly false and unsupported by any evidence to be found in the record.

The truth was and is, as will be fully demonstrated to the court on review, that as the President of the United States by authority of the Congress advanced and pegged the price of gold, from time to time, so the reservoir of tens of millions of tons of proven low grade ore, mined by the glory-hole method, with the complete 2,000 ton a day milling capacity equipment of Chain O'Mines became more and more valuable.

Wishful thinking, erroneous assumptions, naked, untrue assertions and a jumble of words, words and more words, based thereon, unsupported by factual evidence, may temporarily cause "confusion worse confounded" but will ultimately be pierced by the light of truth to the end that right may prevail and justice triumph.

At page 37 of respondents' answer it is sought to give definitions of the words "float," "temporary phase" and "refinancing project" employed by the Appeals Court. We submit that this court is thoroughly familiar with the meaning of these words and phrases and their true definitions. However, Cyclopedic Law Dictionary, at page 417, defines a floating security as follows:

"FLOATING SECURITY. A floating security is 'a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course.' I Ch. 434, 10 Ch. D. 530."

"Debentures which allow a company to deal with its assets in the ordinary course of business until the company is wound up or stops business or a receiver is appointed at the instance of the debenture holders constitute a floating security. They constitute a charge and give a license to the company to carry on its business. 2 Ch. 118, 1 Ch. 641."

Moreover, on page 42 of respondents' answer it is asserted that "parole" testimony means both "oral" and "written." Cyclopedia Law Dictionary give the following definitions:

"Parol" (more properly *parole*, a French word, meaning literally "word" or "speech"). "Oral, by word of mouth."

"In contracts. Verbal or merely written, as distinguished from sealed. 1 Chit. Con. 1; 3 Johns. Case (N. Y.) 60."

"In evidence. Parol evidence is that delivered verbally by witnesses in court."

In our original petition for the writ of certiorari, we pointed out specifically wherein the Appeals Court had misconceived and misinterpreted the local or Illinois law applicable. We here take the liberty of quoting briefly from decisions of the Supreme Court of Illinois on the subjects of fiduciary and confidential relations, constructive trusts as well as constructive frauds, and the force and effect to be given to Chancellor's findings and judgments.

In *Dixmoor Golf Club* v. *Evans*, 325 Ill. 612, a case involving confidential relations by Directors of a corporation with respect to corporate property, p. 615, the court said:

> "The decision of this case does not depend upon the doctrine of the rescission of contracts or the fiduciary relation of the promoters of a corporation to the corporation and its stockholders, but it does depend upon the fiduciary relation which the directors of a corporation hold to the corporation and to the stockholders. The law is well settled that a trustee cannot without a breach of the trust deal with its subject matter in such a manner as to make a profit for his own benefit. It requires no very keen moral perception to recognize the obvious justice of this universal rule of law, justice and morality. * * * (Citing authorities) While a director is not disqualified from dealing with the corporation and buying its property or selling property to it, he must act fairly and be free from all fraud or unfair conduct, his transactions will be subjected to the closest scrutiny, and if not conducted with the utmost fairness, to the end that the corporation shall have received full value, they will be set aside. (*Nowak* v. *National Car Coupler Co.*, 260 Ill. 260.) If he becomes a party to a contract with the corporation, his obligation to candor and fair dealing is increased in the precise degree that his representative character has given him power and control from the confidence reposed in him by the stockholders. (*Beach* v. *Miller*, 130 Ill. 162.) * * *."

In *Sherwin-Will Co.* v. *Watson Industries*, 361 Ill. 598, a fraudulent conveyance case, p. 605, the court said:

"Since Watson knew of his fraudulent intent as director and president of Watson Orchards, Inc., he knew it also as director and president of Watson Industries, Inc. (*Simmons* v. *Roseland Security Vault Co.,* 331 Ill. 563.) The fact that the contract evidencing the secret trust was assigned and the assignment later recorded, or that a record of the transaction was made in the minutes of the directors of Watson Orchards, Inc., and in the written contract between the parties, does not change the fact that the agreement was secret and that there was no notice, constructive or otherwise, to other creditors. (*Schmidt* v. *Shaver,* 196 Ill. 108.) Where a grantor or assignor sells for the purpose of defeating the claim of his creditors, and the grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another. (Bump on Fraudulent Conveyances, (2d ed.) 197, *et seq.*) A deed fraudulent in fact is absolutely void as against creditors and is not permitted to stand for any purpose of reimbursement or indemnity. (*Beidler* v. *Crane,* 135 Ill. 92.)"

In *Pope* v. *Dapray,* 176 Ill. 478, on p. 484, discussing a constructive trust, the court said:

"If it be true, as contended, the facts presented show a constructive trust, such may be proved and established by parol. A constructive trust is one that arises where a person clothed with some fiduciary character, by fraud or otherwise gains something for himself. (Perry on Trusts, sec. 27; *Reed* v. *Reed,* 135 Ill. 482.) It is also further defined as where 'a

person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rule of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations, and this trust will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it, or execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society.' (Perry on Trusts, sec. 166.) This rule has been by this court quoted with approval in the cases of *Beach* v. *Dyer,* 93 Ill. 295, and *Allen* v. *Jackson,* 122 *id.* 567."

In that case, the court held that the entire transaction, and the confidential relations existing between the parties, created a constructive trust in favor of plaintiff, and reversed the Chancellor and the Appellate court who had otherwise decreed.

In *Biggins* v. *Lambert,* 213 Ill. 625, an alleged fraudulent conveyance case, p. 629, the court said:

"It is further contended by the appellant that the evidence fails to show any guilty intent or knowledge on the part of Elizabeth Biggins, or even any fraud on the part of John Ward, as to this conveyance, each of which is necessary to be shown in order to impeach and set aside the deed in question. In the consideration of this point it is not necessary that we set out the evidence tending to support the findings of the Chancellor as to the existence of fraud. We

> have carefully reviewed the evidence presented by the abstract furnished us. It is very conflicting. There is evidence which, if believed by the Chancellor, amply justifies the conclusion reached by him. He saw and heard the witnesses, and had much better opportunity for judging as to the weight that should be attached to the testimony of the various witnesses than we have. Under such circumstances the rule is well settled that this court will not disturb the findings of the Chancellor unless manifestly erroneous. Leaving out of consideration the conflicting statement of the witnesses, many circumstances about which there is no question appear that of themselves are strong badges of fraud. * * *"

In *Lawson* v. *Hunt*, 153 Ill. 232, a transfer of the equity of redemption case, also involving confidential relations, concluding the opinion, p. 239, the court said:

> "Upon the hearing of the cause, as we have already stated, appellant and his witnesses were examined in open court by the Chancellor. Appellant and his mother denied, in the most positive terms, all the material facts that had been testified to by appellee and her witnesses. The Chancellor, seeing these two witnesses upon the stand and hearing them testify, had much better opportunity then we have for judgment of their credibility, and it is manifest from the findings and the decree of the court that the Chancellor did not believe that said witnesses swore the truth."

In that cause the sale was effected and certificate of sale issued in the month of August, 1886, and just a few days of August, 1887, remained of the redemption period when the fraud found by the Court was perpetrated.

We also submit herewith a few quotations from decisions of the United States Supreme Court applicable to contentions of petitioners herein:

In the case of *Moore* v. *Crawford,* 130 U. S. 122, 32 L. Ed. 878, Mr. Justice Fuller on this subject, and on page 880 (L. E.) of the opinion, said:

> "Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.' Pomeroy, Eq. Jur. § 1053."

In *Angle, Administratrix, etc.* v. *Chicago St. P. M. & O. Ry. Co.,* 151 U. S. 1, 38 L. Ed. 55, the court, on page 67 (L. E.), said:

> "And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially, at least, out of their proceeds. While

no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

"In Pomeroy's Eq. Jur. § 155, the author says, citing many cases: 'If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.' And again, in section 1053: 'In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit.

The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.'

"These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road; work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property."

In *Jackson, et al.* v. *Ludeling, et al.*, 21 Wall. 616, 22 L. Ed. 492, the court had before it quite a similar transaction involving the fraudulent conduct of a director, and quoting from page 498 (L. E.) the court said:

"Thus directors of the Company, owing duties to its stockholders and creditors, not only combined to obtain the company's property for themselves at a sacrifice, through the formality of a judicial sale, but were active participants in successful efforts to defeat a sale for $550,000 in order that they might become the purchasers for $50,000.

"It is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them admits of no doubt.

Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent to carry out its plans. He knew its purposes. He knew its illegality. He had negotiated the surrender of Horne, with full knowledge of Horne's breach of trust. He assumed the control of Gordon's executory process and, as we have noticed, when told that Gordon had consented to stay the sale, he declared that Gordon had no power to do it. Indeed, Ludeling appears to have had complete possession of the sheriff. He drew up the sheriff's return, carefully stating in it that all the requirements and formalities of the law had been complied with, in the second offering as they had been in the first, and he was, as the evidence shows, most active in defeating an adjudication to Branner & Co. on their large bid."

We further quote from a well reasoned Circuit Court of Appeals opinion (C.C.A. 8) supported by decisions of this Court, upon the subject of actual, willful fraud, where the wrongdoers may be penalized.

In the case of *United States* v. *Homestake Mining Co.*, 117 Fed. 481 (C. C. A. 8), the court, beginning on page 485, said:

"Every trespasser breaks the law, and to every trespasser the maxim applies that every man knows the law. Notwithstanding all this, the law, in its wisdom, perceives the marked difference in the heinousness of the offenses of those who recklessly, or with actual intention to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose, no actual, willful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value

of the lumber or the ore they take at the time they sell or use it, while the latter class shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine. The maxim that every man knows the law applies to all the members of both classes alike. It neither differentiates the classes nor their members, and it has no more relevancy to the real question which cases of this character present than the proposition that three and three are six. That question is always based on the conceded propositions that the defendant has violated the law and that every man knows the law. The question, then, is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a willful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the wood in the tree or of the ore in the mine is the limit of his indebtedness. The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser."

Other cases supporting this rule are:

Bolles Wooden Ware Company v. *United States,* 106 U. S. 432, 433; 27 L. Ed. 230.

Resurrection G. M. Co. v. *Fortune G. M. Co.,* 64 C. C. A. 180, 192; 129 Fed. 668, 679.

Liberty Bell G. M. Co. v. *Smuggler-Union M. Co.,* 203 Fed. 795, 806.

Central C. & C. Co. v. *Penny,* 97 C. C. A. 597; 173 Fed. 340, 344.

Backer v. *Penn. Lubricating Co.,* 89 C. C. A. 419; 162 Fed. 627, 631.

Silver King C. M. Co. v. *Silver King C. M. Co.,* 204 Fed. 166, 178.

Illinois and St. Louis R. R. & C. Company v. *Ogle,* 82 Ill. 627.

Ege v. *Kille,* 84 Penn. St. 333.

Durant M. Co. v. *Percy M. Co.,* 93 Fed. 166.

Patchen v. *Keeley,* 19 Nev. 404, 14 Pac. 347, 353.

Lightner M. Co. v. *Lane,* 161 Cal. 689; 120 Pac. 771, 777.

In conclusion it is respectfully urged that petitioners' petition for the writ of certiorari herein be granted, thereby permitting petitioners to fully demonstrate and prove to this High and final Tribunal that the inferior appeals court herein committed error in reversing the judgment of the trial court, to the end that truth may prevail.

Respectfully submitted,

FELIX J. STREYCKMANS,
Counsel for Petitioners.

JOHAN WAAGE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 118

CHAIN O'MINES, A CORPORATION, ET. AL.,
Petitioners,

vs.

UNITED GILPIN CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ABRAHAM W. BRUSSELL,
Attorney for Respondents.

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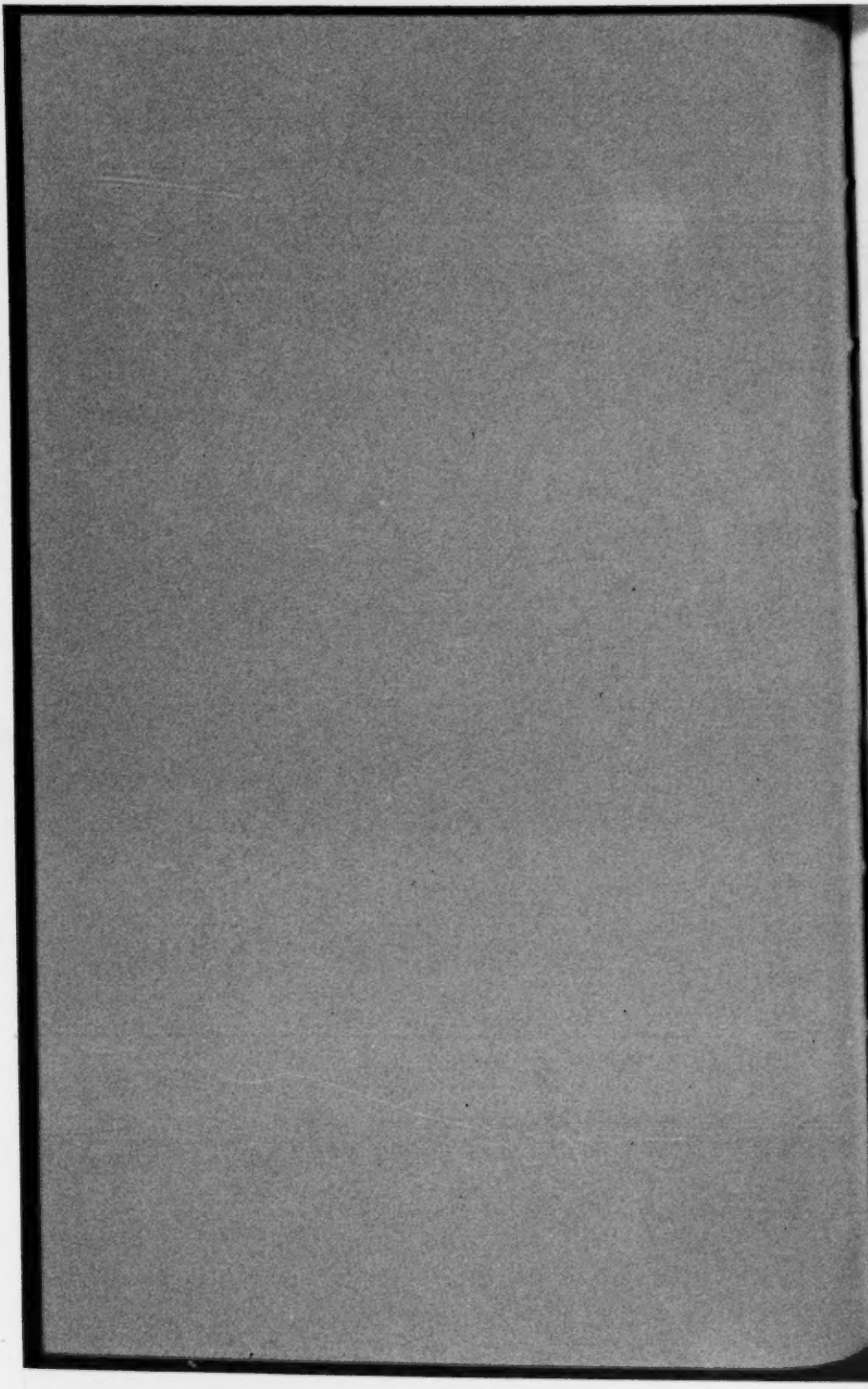

INDEX.

CASES CITED.

PAGE

CASES CITED (continued).

PAGE

CASES CITED (continued).

STATUTES AND LEGAL PERIODICALS.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents urge that the Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Jurisdiction.

We concede the jurisdiction of this Court under the Certiorari Act to *entertain* a petition for Writ of Certiorari in this case.

Exercise of Jurisdiction.

But we contend that the case at bar presents no circumstances that warrant the grant of Certiorari in this cause since the petition shows that the petitioners are simply seeking "*another hearing*" (*Magnum Co.* v. *Coty*, 262 U. S. 159, 163).

Reasons Urged in Petition for Writ of Certiorari to Review the Decree and Judgment of the Circuit Court of Appeals in Favor of the Respondents.

Petition at pages 3-5 does not clearly separate the grounds upon which they contend that a Writ of Certiorari should be granted. Under the three separate headings entitled "Basis of Jurisdiction" (p. 3), "Questions Presented" (4) and "Reasons Relied on for the Allowance of the Writ" (4-5), petitioners "mingle" several contentions that we take as the reasons relied on by petitioners for the allowance of the Writ. Roughly grouping them, they are:

1. The contention that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision (This is B, p. 3, and No. 7, p. 5).

2. The contention that the Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the weight of authority (This is C, at p. 3).

[This contention is immediately disposed of by pointing out that since the decision of this Court in *Erie R. R.* v. *Tompkins*, 304 U. S. 64, 78, this "ground" for granting Certiorari is no longer applicable. The amendment by this Court of Rule 38, paragraph 5, b, as of February 27, 1939, recognizes that there no longer is any ground for granting

Certiorari to review the decision of a federal Circuit Court of Appeals on the alleged ground that the decision of "Federal" general law, is in conflict with the weight of authority].

3. The contention that the Circuit Court of Appeals has decided a question of local law in a way in conflict with applicable local decisions (This is D at p. 3, and probably includes most of the "Reasons" at pp. 4-5. This is probably this ground upon which petitioners most strongly rely).

4. The contention that the Circuit Court of Appeals did not have the right to review the evidence and reverse the findings of fact of the District Court (This is 1 under Questions Presented at p. 4).

5. The contention that the decision of the Circuit Court of Appeals on the particular facts is erroneous on the merits (This is 2 and 3 under Questions Presented at 4, and Nos. 1, 2, 3, 5, 6 and 7 on pp. 4 and 5 under Reasons Relied On).

6. The contention that the decision of the Circuit Court of Appeals is in conflict with a decision of the same Court on the same question or matter herein involved (This is No. 4 in Reasons relied on at p. 4).

We contend: that ALL of the aforesaid petitioners' reasons when analyzed and even if considered in the light of the argument advanced in petitioners' brief, simply amounts to a contention that a Writ of Certiorari should be granted in *this* case on the ground that the Circuit Court of Appeals erred on the merits of the particular controversy between the parties.

In answer we say:

The certiorari jurisdiction of this Court is not exercised in such a case to grant another hearing to petitioners.

The Reasons for not Reviewing by Certiorari the Merits of a Particular Case.

1. Granting of a Writ of Certiorari is *not* warranted merely to review the evidence or the inferences to be drawn from it.

In *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175 Justice Butler said in reference to granting certiorari, under Rule 38 (5, b) of this court:

> "Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would *not* be warranted merely *to review the evidence or inferences to be drawn from it.*" (Italics ours.)
>
> 304 U. S. at 178 (aff'd on rehearing 305 U. S. 124).

To the same effect:

> *Southern Power Co.* v. *North Carolina Public Service Commission*, 263 U. S. 508, 509;
> *United States* v. *Johnson*, 268 U. S. 220, 227;
> *New York Central* v. *Kinney*, 260 U. S. 340, 345;
> *Houston Oil* v. *Goodrich*, 245 U. S. 440.

The rationale implicit in the exercise of Certiorari jurisdiction by this Court within the meaning of the standards set by Rule 38 (5, b) of this court, as formulated by Mr. Justice Roberts in his dissenting opinion in *Deputy* v. *DuPont*, 84 Lawyers Ed. 314 at 320 (1940), is authority for our statement that to grant Certiorari in a case such as the one now before this Court would be to impair the effectiveness of this Court in the federal judicial system. To grant Certiorari in this case would amount to giving the petitioners, the defeated party in the Circuit Court of Appeals, a *further hearing.* This, of course, was not the intention or the purpose of the Certiorari act. (Taft C. J. in *Magnum Co.* v. *Coty*, 262 U. S. 159, at 163.)

In the case at bar both the petition for certiorari and the brief disclose that the principles of law involved are not in controversy, and that the Writ is sought merely to obtain review of the decision by the Circuit Court of Appeals in applying well settled principles of Illinois law on the narrow ground that the Court erred in determining issues that were peculiar to the facts of the particular case by its application of these well settled principles of law to these particular facts. This Court has repeatedly held that it will not use the Certiorari Act for such purpose.

See 53 Harvard Law Review 579 at 595 and the many authorities therein cited in approval of this Court's interpretation of the Certiorari Act.

Let us assume that Rule 38 (5, b) of this court "illustrating" exercise of certiorari jurisdiction by this Court applies to the facts of the case at bar.

Even then respondents contend that on the facts of the particular case before it the decision of the Circuit Court of Appeals on the merits was and is correct, and should be sustained by this Court by the denial of petition for certiorari.

Scope of Review on an Equity Appeal.

First, we dispose of petitioners' contention that the Circuit Court of Appeals did not have "the right to review the evidence and reverse the findings of fact of the District Court" (p. 4).

This was an appeal in an equity proceeding.

The Circuit Court of Appeals on an equity appeal from the District Court decree not only had the *power* but was under the *duty* of reviewing the facts *de novo* and in entering such decree as the Court of first instance *ought* to have

made even though the Court of Appeals gave proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.

Keller v. *Potomac Electric Co.*, 261 U. S. 428, 443-444

states the rule upon an "equity" appeal to be:

> "In that procedure (equity) an appeal brings up the whole record and the Appellate Court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of facts which should be accorded to a tribunal which heard the witnesses."

This Court has repeatedly held that on an equity appeal the *facts* as well as the law are reviewable, and if the findings of the trial court are against the weight of the evidence, the Circuit Court of Appeals should reverse such findings.

Morley v. *Md. Casualty Co.*, 300 U. S. 185, 191;
Virginian Railway v. *U. S.*, 272 U. S. 658, 675;
Cincinnatti v. *C. & H. Traction Co.*, 245 U. S. 446, 454;
Dower v. *Richards*, 151 U. S. 658, 663-664;
Dodge v. *Knowles*, 114 U. S. 430, 434;
Wiscart v. *D'Auchy*, 3 Dallas 321, 327.

In accordance with this rule, the Circuit Court of Appeals considered the facts in the record as well as the law, and entered a decree in favor of the respondents. This practice was in accord with previous decisions of the same Circuit, namely,

Uihlein v. *General Electric Co.*, 47 Fed. (2d) 997, 1002 (cited by the Court, R. 1142);

American Central Insurance Co. v. *Harmon Mills,* 39 Fed. (2d) 21, 24;
American Rotary Valve v. *Moorehead,* 226 Fed. 202, 203.

This practice of the Circuit Court of Appeals for the Seventh Circuit on an equity appeal is in accord with the practice in other circuits. See

Hopkins v. *Texas Co.,* 62 Fed. (2d) 691, (C. C. A. 10, Cert. denied, 290 U. S. 629);
Aro Equipment Co. v. *Harry Wissler,* 84 Fed. (2d) 619, (C. C. A. 8);
Sapulpa Petroleum v. *McCrary,* 4 Fed. (2nd) 645 (where C. C. A. 4 reverses finding of facts by Chancellor; cert. denied 269 U. S. 561).
Hoeltke v. *Kemp Manfg. Co.,* 80 Fed. (2nd) 912, 923, 927 (C. C. A. 4, where C. C. A. reverses finding of fact by the Chancellor, cert. den. 298 U. S. 673).

The Merits.

Did the Circuit Court of Appeals correctly review the evidence and apply the "applicable" Illinois law?

Respondents say that the Circuit Court of Appeals rendered the correct decision on the merits. We defer discussion of the merits to our brief, *infra.*

For reasons of conciseness and to avoid duplication we also defer to our brief the discussion of suggestion made by petitioners that the decision of the Circuit Court of Appeals was a decision on a question of local law in a way in conflict with applicable local decisions.

Summary Statement of Matter Involved.

Petitioners' summary statement (p. 2) is inadequate. The opinion of the Circuit Court of Appeals discloses a lengthy chronological outline summary (R. 1133) of extremely complicated facts (R. 1134).

Petitioners' summary attempts to single out one fact, namely, the contract of June 19, 1934, as the basis of their entire law suit. This is inaccurate, for the "law suit" was based on the entire evidence as shown by the two volumes of evidence.

An adequate summary statement is as follows:

Chain O'Mines Corporation, organized in 1929, operated certain gold mining properties in the State of Colorado. Operations were a financial loss from the outset. William Muchow, the corporate president, and originally the promoter, attempted various legal plans or devices for either operating the property through his own syndicate or selling the property to third persons. This included approaching Kremm, one of the respondents, in 1933 and asking for his assistance in selling the property. Kremm attempted both to raise money for the operation of the properties and to sell the properties. All attempts were unsuccessful. By the winter of 1933 Chain O'Mines was financially wrecked. The property was being sold for taxes. Liens had accumulated in the sum of $97,000 for labor and electric light power liens and approximately $25,000 for various other judgments that had been taken against it (Rec. 879-880).

In the late winter of 1934 Muchow again approached Kremm for assistance and financial help. Kremm gave both. On March 17, 1934, the labor and power lien suits culminated in a decree whereby the lienors would be entitled to a deed to the property upon sale under a decree of foreclosure finding the liens to amount to approximately $97,000. Kremm, at the insistence of Muchow and the directors of the Chain O'Mines, attempted to work out some agreement with the owners of the lien decree. In May, 1934, Kremm obtained offers to sell such liens under a contract of sale. Kremm attempted to raise money from the stockholders of Chain O'Mines to purchase these liens

or decree but could not even raise the sum of $1,000. Kremm then interested Schwerin, one of the respondents, in advancing some cash as an investment for the purpose of seeing whether or not the mines could be profitably operated and the labor liens paid off from such operations. It was at that time that the contract of June 19, 1934, was executed by Seeley, one of the respondents. Operations of the mine were commenced and continued under varying individuals or corporations. Schwerin and his associates kept on advancing cash and making various loans from June, 1934, for the operation of the properties up until the institution of the suit by the petitioners in the Federal District Court in November, 1937. There were approximately five separate attempts by Schwerin and his associates to profitably operate the mines, including the attempts by an independent engineering corporation from Cleveland. None of these attempts were financially successful. All of the operations lost money. Schwerin and his associates had kept on putting additional moneys into the operations and attempting to secure security for such loans against the properties. On the basis of the foregoing facts petitioners started suit in November, 1937.

The trial court found that Scherwin and his associates had on May 8, 1934, entered into a fraudulent scheme and conspiracy to deprive the Chain O'Mines and its stockholders of its property without paying any compensation for it; that all acts by the respondents subsequent to the said date were part of the fraudulent scheme and conspiracy (R. 1054, 1055). The Circuit Court of Appeals reviewed and considered all the evidence, and found that the Chain O'Mines was financially wrecked when the respondents came into the picture (R. 1141); that the respondents advanced money in an attempt to profitably operate the mine; that this gold mine, as in the case of other gold mines, resulted in the loss of money to those operating and investing; that the facts of operation show the honesty

and good faith of the respondents even though they continued to lose money; that they had advanced money and became more and more involved each year; that in protecting their loans and investments the respondents were within their legal rights, and were not guilty of fraud; that all the evidence measured in the light of the decisions of the Illinois Supreme Court with regard to the proof of a constructive trust by clear, convincing, unequivocal and unmistakable evidence (R. 1141) required that the trial court's decree should be reversed with directions to dismiss the suit.

The District Court did *not* rely upon the construction of the contract as the basis for finding fraud. The Circuit Court of Appeals did *not* rely upon the interpretation of the contract as the basis for not finding fraud, nor did it rely upon the unprofitableness of the venture as the ground for not finding fraud.

The petitioners' theory at the trial was that the defendants were guilty of actual fraud for which equity would impose a constructive trust, and that the petitioners were entitled to a return of all of the properties without any deductions or reimbursements to the respondents, and were entitled to an accounting of the moneys for the ore mined while the respondents were operating the mine. These theories were the ones relied on by petitioners in the Circuit Court of Appeals. Even in petitioners' petition for rehearing in the Circuit Court of Appeals they did *not* ask the Circuit Court of Appeals to grant the petitioners "some" equitable relief, they repeated their contentions made in the trial court and asked that the decree of the District Court should be *affirmed* (R. 1171).

BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

It is doubtful whether the memorandum opinion of the District Court (R. 1049, 1053) relied on so strongly by petitioners will be considered by this Court in place of the findings of fact and conclusions of law made by the trial court (R. 1054, 1076, 1089, 1090) (*Inter-State Circuit, Inc.* v. *United States,* 304 U. S. 455, 456, 457; *Railway Commission* v. *Maxey,* 281 U. S. 82, 83).

If the memorandum is so considered it is significant that the District Court was apparently not certain of his findings, because he expressly stated that he suggested that counsel consider whether they could not settle the case. He stated he was moved to that suggestion by his belief that the values involved were not nearly as great as the aggregate of the moneys that had been invested, and that it would be better for all concerned to devote their energies to developing the property rather than to fighting among themselves (R. 1053). A suggestion of compromise in a case where the trial court has stamped the defendants guilty of fraud seems illogical and inconsistent. In addition, this proves that the gold mining properties are not the valuable properties as claimed by petitioners throughout their brief.

The opinion of the Circuit Court of Appeals is reported in 109 Fed. (2nd) 617 and is printed in the record and filed herein (Rec. 1134-1143).

STATEMENT OF THE CASE.

Questions Open Under the Petition.

In the petitioners' petition for certiorari—as distinguished from their brief in support—petitioners do not state that they desire to have the decree of the Circuit Court of Appeals *modified* as distinguished from reversed. In their brief, petitioners may be said by implication and by inferential argument to contend that the Court of Appeals should have directed a modification of the District Court decree instead of reversing it.

Petitioners' pleadings indicate that although they started out on a theory of specific performance of the contract of June 19, 1934, (see prayers for relief in paragraphs 1, 2 and 5 in R. 18 and 19) at and during the trial they definitely *changed* their theories by substituting in place of *such* prayers for relief prayers based upon *findings of actual fraud* (see R. 73, 75).

This change to fraud was in accord with the theory and rulings of the trial court (see R. 1042).

In the Circuit Court of Appeals the petitioners relied solely upon the theory that the trial court's decree finding fraud should be sustained. They did not ask for *any other* relief or ruling from the Circuit Court of Appeals. Even after the opinion reversing the trial court had been filed in the Circuit Court of Appeals, petitioners' petition for rehearing indicates that the petitioners still adhered to their theory that the decree of the District Court should be *affirmed* (R. 1171). They did not ask for any *modification* of the decree reversing and remanding with directions to dismiss the suit.

It is fundamental that questions not raised in the Circuit Court of Appeals will not be considered by this Court on certiorari.

Parties should not be permitted to try their case on one theory "below" and then switch to a different theory in a reviewing court.

Also, it is well settled that only those *questions* raised in the petition for certiorari will be considered by this Court; the questions raised in the brief in support of the petition for certiorari will not be open to petitioners in this Court.

Under the recent decision in *General Talking Pictures Corp.* v. *Western Electric Co., et al,* 304 U. S. 175, 178, a statement of points in the supporting brief does not *expand* or add to the questions stated in the petition. It was held that this Court's consideration of alleged errors must be limited to the grounds raised in his certiorari petition. See also:

Clark v. *Williard,* 294 U. S. 211, 216;
Helvering v. *Taylor,* 293 U. S. 507, 511;
Washington Coach Co. v. *Labor Board,* 301 U. S. 142-146.

In addition, the fact that this point was not raised in the Circuit Court of Appeals precludes the petitioners from raising this contention in this Court.

The several answers of the respondents (R. 25-66) set out in detail the facts relied on by the respondents for their defenses in the trial court. Long prior to the trial the petitioners were informed of the facts upon which the defendants claimed that the petitioners had no cause of action. The evidence offered by the petitioners at the trial in the District Court was offered with full knowledge of the facts and theories relied on by the respondents in their defense. It was on all this testimony that the Circuit Court of Appeals ruled that the petitioners had failed to make out a case of fraud within the meaning of the Illinois authorities.

The Facts.

The opinion of the Circuit Court of Appeals presents an outlined summary of the facts as made by that Court after reading of a record comprising 1,129 pages. This summary constitutes several pages, including voluminous footnotes. But the petitioners in their brief merely attempt to state *some* of the *conflicting* facts in approximately six pages. This inadequate statement of facts is highly insufficient to properly present the issues of fact and law raised by the record.

This Court in reviewing the decision of the Circuit Court of Appeals will recognize that the said Court had the power to consider the facts *de novo,* and to enter such decree as warranted and required by equity and justice as the *entire record.* The petitioners seek to "pick and choose" certain bits of testimony upon which they rely in their attempt to make the findings of the Circuit Court of Appeals appear to be contrary to the manifest weight of the evidence. This Court in an analogous situation has pointed out that a Court would not be warranted in picking and choosing bits of evidence for the purpose of making findings of fact contrary to the findings of the fact-finding body, *i. e.,* the Federal Trade Commission, *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 116, 117.

Under the rules of this Court it is not our function in the answer to the petition to argue the merits of the case at great length. Yet, nevertheless, we feel that it is our duty to briefly discuss the merits, and that such brief discussion will clearly indicate to this Court the decision of the Circuit Court of Appeals on the merits *was* correct. The merits cannot be discussed unless an adequate statement of facts is presented.

With regard to an adequate statement of facts, the Circuit Court of Appeals in its opinion stated that "The facts are most complicated" (R. 1134). Our answer to the

petition for rehearing in the Circuit Court of Appeal shows that in our original brief in the Circuit Court of Appeals such a complete and fair statement of essential facts occupied pages 9 to 48 of that brief (See Rec. 1178, 1180, 1181). It was upon this exhaustive treatment of the facts that the Circuit Court of Appeals made its outline of the essential facts and came to its conclusion. It is not our desire to state the facts in similar detail in this court because it would unduly burden this brief and this Court.

Consequently, we shall only state the facts surrounding the drawing up of the so-called contract of June 19, 1934. This will be a good illustration of the nature of the testimony in the record that would apply to other important issues of fact—such as the operation of the mines, the obtaining of security interests, by respondents for moneys advanced, the cancellation of the Lewison contract, the obtaining of the tax titles, and all of the other essential issues of fact which the Circuit Court of Appeals held indicated the good faith of the respondents.

In addition this "background" is essential to an understanding of all events subsequently occurring.

SUMMARY OF LEADING FACTS.

1. Background of Chain O'Mines to June 19, 1934.

(a) Organization of Chain O'Mines.

Chain O'Mines, Inc., a corporation (hereinafter referred to as plaintiff) was organized by Dr. Wm. Muchow, an individual engaged in mining operations, under the laws of Nevada in 1929. It became the owner of approximately 1100 gold mining claims located in Gilpin County, Colorado. See Maps, Plaintiffs' Exhibits 37, 38 and 39 (R. 361-368). It began to operate these gold mines by means of capital raised from its stockholders. Later it raised additional money through a bond issue secured by a mortgage in the sum of $300,000.00 dated June 15, 1932 and due June 15, 1934 (R. 298).

By 1932 the operation of the gold mines proved to be unprofitable. From that time on the plaintiff was in serious financial difficulties (R. 260).

(b) Financial difficulties Chain O'Mines, 1932. Kremm assists Chain O'Mines and others.

In the summer of 1932 (R. 260) Defendant Kremm, a business man who had considerable experience in banks and in the financing and reorganization business, was approached by various individuals including Attorney Meyer and Mr. Dyche, business manager of N. W. University, on behalf of the plaintiff, who attempted to interest him in the "reforming" of the plaintiffs' gold mining properties (R. 932). In the latter part of 1932, Dr. Wm. M. Muchow, who owned 200,000 shares of stock in the Plaintiff Corporation (R. 374) and Miss Avis Hart, the secretary to Dr. Muchow, came to see Kremm at his office and they asked him to assist the Plaintiff Corporation out of its financial difficulties. Kremm purchased 50 shares of stock in the Plaintiff Corporation about December, 1932 (R. 212). Kremm talked to some of the important stockholders in the Plaintiff Corporation. The names of these stockholders were furnished by Dr. Muchow. Muchow brought Mr. Banks to Kremm's office and introduced him as the largest stockholder. He also brought a Mr. Appleton. Discussion was had between Defendant Kremm and Messrs. Appleton and Banks wherein the stockholders offered to support him by giving up one-half their interest, or any other thing that could be done because the Corporation was in grave difficulties; there was internal dissension and something had to be done. Kremm studied the situation (R. 932-933).

Subsequently numerous discussions concerning the property and the financial difficulties were had between Muchow, Kremm and various other stockholders of the plaintiff

(R. 260). Muchow then suggested the sale of the property for the sum of one and one-half million dollars, and offered to pay Kremm 10% commission (R. 371-372, 933). Kremm thereupon attempted to sell the properties to various individuals in the mining business, and also attempted to sell this property in England. Kremm furnished this English broker with material to push the sale of the properties including moving picture films of the properties furnished by Muchow and Hart. These negotiations were unsuccessful and negotiations fell through (R. 933-934).

During the months of November and December, 1932, Kremm had loaned various sums of money to the plaintiff. On or about January 19, 1933, either Dr. Muchow or Miss Hart again came to Kremm's office and requested more money. They persuaded him to purchase stock and he did, giving $60.00 for the shares of stock (R. 212, 935).

In the early part of 1933, Kremm and Muchow went to Central City, Colorado, to inspect the gold mining properties of the plaintiff (R. 260). Muchow had informed Kremm that the situation in Central City had become very serious and that Kremm should be personally acquainted with the physical property in order to be able to obtain results in helping the Plaintiff Corporation (R. 935).

At that time there were certain labor claim difficulties at the mines, and a conference was had between Kremm, Muchow, the superintendent of the mines and Herbert Munroe, the Colorado attorney for the Plaintiff Corporation (R. 936).

On Kremm's return to Chicago there was a meeting of some of the directors of the plaintiff and Kremm reported what had occurred in Colorado. He was then asked to gain indulgences from the corporate creditors. Kremm called on several of the creditors in Chicago and also had conferences with creditors from Denver (R. 936). At that

time Kremm was devoting himself to plans for the sale of the property.

When the plans for the sale of the property fell through, other plans for the refinancing or reconstruction of the properties were considered. One of these was called a Reconstruction Plan which required the raising of money from the stockholders and participation by the creditors. Miss Hart circularized the entire creditor list which included approximately one hundred creditors outside of the laborers. Kremm talked to various stockholders about this plan. No money was raised under this plan (R. 937).

Kremm became a director of Chain O'Mines in February, 1933. He did so because of the argument by Dr. Muchow and Miss Hart that if he were a board member, it would assist him in dealing with the creditors. He was director until April, 1933 (R. 260). During the time Kremm was director the financial difficulties of the Plaintiff Corporation were discussed, and various attempts were made to work out other methods or means by which the operation of the mines could be continued. These plans fell through (R. 260-261).

Subsequent to Kremm's resignation from the Board of Directors of the Plaintiff Corporation, in April, 1933, he was frequently seen by Dr. Muchow with regard to the corporate matters (R. 261).

(c) Syndicate operates the mining property.

About October, 1933, the Chain O'Mines was no longer operating the gold mines. At that time, it leased the gold mines for the purposes of operation, to a syndicate of men called the "Chain Syndicate" headed by Dr. Muchow, former president of plaintiff who resigned to take over the operation (R. 260) as shown by Plaintiff's Exhibit 33, dated September 30, 1933 (R. 277-288). The Chain

O'Mines was then indebted to various creditors in an aggregate of over $400,000.00, which sum it was unable to pay. In return for a certain cash consideration paid and in return for certain other promises made by the Syndicate the Chain O'Mines leased the gold mine properties to the Syndicate for the purpose of operation (R. 285).

The Syndicate operated the gold mines from October, 1933, until February, 1934. At that time the Syndicate operation collapsed because the operation proved to be unprofitable. Various first lien claims consisting of labor liens and electric power liens amounting to a total of approximately $95,000.00 were due and unpaid by the month of February, 1934. (Suit to foreclose such liens had been filed, and trial was held on February 17, 1934 (R. 867)). The Syndicate had reduced certain of the indebtedness of the plaintiff corporation by obtaining $18,000.00 from stockholders of the Plaintiff Corporation or members of the Chain Syndicate, and reduced the sum of $32,000.00 by conversion of debts against the plaintiff into units of the Chain Syndicate which in turn became Chain O'Mines stock (R. 225).

(d) Kremm again asked for assistance by Muchow.

Of the $18,000.00 that came from stockholders, that included $100.00 from Defendant Kremm (R. 225). In February, 1934, the Board of Directors of Plaintiff Corporation defaulted the Chain Syndicate for its failure to comply with the provisions of the leasing contract. At that time the operations of the gold mines were entirely stopped.

At that time Dr. Muchow and Miss Hart attempted to have the Board of Directors reinstate the lease. Miss Hart went to all of the members of the Syndicate to reinstate the lease. She approached Defendant Kremm (R. 213) and asked him for help.

After the cancellation of the Syndicate lease Muchow also approached Kremm with regard to reinstating the Syndicate lease or arranging a similar agreement (R. 261). Sometimes both Miss Hart and Muchow were present (R. 213) and these meetings were very frequent. Miss Hart showed Kremm the record of the Syndicate operation and the Syndicate earnings in an attempt to persuade him to assist them in the reinstatement of the Syndicate lease. Dr. Muchow also submitted records to Kremm (R. 261).

On February 19, 1934, the labor lien suits in Gilpin County came on for trial. Evidence was taken for several days. On March 17th, 1934, the Trial Court entered a decree in favor of the lien claimants and against the various defendants, including the Plaintiff Corporation, Miss Hart and Dr. Muchow and Herbert Munroe as Trustee under the bond issue, finding in substance that the valid liens on the property amounted to approximately $97,000.00 including costs and that such liens took a preference over all claims, including the bond issue of $300,000.00. Under the Colorado law, the judgment creditors under this lien decree could avail themselves of immediate possession of the gold mine properties (R. 903).

From the time of the entry of this decree on March 17, 1934, until sometime in May, 1934, Defendant Kremm, together with Dr. Muchow and Miss Hart, working with stockholders, etc., attempted to raise money with which to satisfy this labor and power lien or to work out some arrangement whereby the properties would not be taken in satisfaction of this labor and power lien. These attempts were unsuccessful.

At that time it appeared to all individuals interested in the properties that the lien claimants could not be paid and that, accordingly, the properties would be lost by virtue of the sheriff's sale.

Meanwhile the failure of Plaintiff Corporation to pay *taxes* for certain of its properties had resulted in the sale of certain valuable properties under the tax claims. On May 5, 1934, tax deeds were to be issued by the County Treasurer of Gilpin County which would forever foreclose the right of Plaintiff Corporation to redeem these particular properties from the sale for the failure to pay such taxes. The plaintiff, prior to May, 1934, had attempted to raise the sum of $552.87, for redemption purposes but the attempts to raise money were unsuccessful. On May 4, 1934, Kremm was advised of these new difficulties. He loaned to the Corporation the sum of $552.87, under a contractual arrangement with regard to the making of a conveyance of these particular gold mining properties and arrangements for the subsequent repurchase by the plaintiff from Kremm of these properties, whereby Kremm would make a profit. The details of this are shown by Plaintiff's Exhibit 2 (R. 82-83).

This money was sent to Herbert Munroe, the Colorado attorney for the Plaintiff Corporation and was tendered to the Treasurer of Gilpin County who refused to accept the tender. Munroe advised the Corporation that he thought he could defeat the issuance of these tax deeds by a suit at law for which suit he would require $100.00 retainer and $50.00 costs. The only Corporation money available was money on deposit with the Compensation Insurance Bureau of Colorado. Munroe was instructed to use such proper balance of this fund for the purposes of the suit.

Kremm assisted Miss Hart and Dr. Muchow. He wrote letters to the Board of Directors, he took a place on the Board of Directors, telling Miss Hart that he was doing so to help the syndicate because he felt that he would thereupon be more powerful in his talk with the Directors (R. 213). He wrote letters to the trustees, to the stockholders, in order to get financial help for the Syndicate. It was their

belief at that time that if they could raise money for the labor lien, the Board would reinstate the defaulted Syndicate lease (R. 213).

(e) Kremm's attempts to avoid loss of properties by Chain O'Mines.

On May 8, 1934, Kremm was reelected to the Board of Directors of Chain O'Mines (R. 84). He was informed by Ottenhoff, the then president of the Plaintiff Corporation, of his election and replied by letter dated May 11, 1934, wherein among other things he stated that he had no operation proposal to make at the time; that he was a stockholder and a creditor; that he knew the Company was in dire straits; that he might become interested in one of the various devices that might be set up to salvage or conserve the properties or possibly in an operating company; that the facts would be disclosed at an appropriate time and that at any time his position on the Board became inconsistent with any other interest he might have, he would tender his resignation (R. 85).

Plaintiff's Exhibit 5 (R. 90), which is the minutes of Board of Directors' meeting of the Plaintiff Corporation, of May 11, 1934, indicates the internal friction existing at that time. George Ottenhoff the president, forwarded his letter of resignation. After considerable discussion this resignation was accepted. The resigning president's bill of $662.44 for money paid out-of-pocket by the resigning president was approved by the Corporation, but there was no money available for payment and the resolution merely stated that it be given the earliest possible consideration and paid as soon as the money was available. The Corporation was then also without an office, due to Ottenhoff's resignation (R. 92-93). Dr. Muchow presented a lengthy proposal for a new operating agreement, including the formation of a group of lien-buyers to settle the labor lien situation, if possible. A committee was appointed by the

Board to go over said proposal and make recommendations to the Board. The committee consisted of Dr. Potts, Defendant Kremm and Mr. Wm. H. Stevenson, vice-president of the Corporation.

On May 12, 1934, there was a special meeting of the Board of Directors at the office of Kremm (R. 87). The committee appointed the previous day had not yet completed its work. A discussion was had before the full Board with regard to the proposed amendments. This discussion lasted four hours. The proposed new agreement used the old leasing agreement, *i. e.*, to the Syndicate, as a guide. Considerable discussion was had as to the terms of the operation agreement. Dr. Muchow offered a resolution to reinstate the Chain Syndicate lease, stating that the Syndicate was not in default at the time of the forfeiture. This was opposed by the other Directors, even though Dr. Muchow insisted that he had to have a resolution to reinstate the Syndicate immediately as he was being sued by Syndicate members and would have 114 suits on his hands if the resolution was not immediately acted upon. DuBuclet replied to Muchow. The committee agreed to work on this matter on the next day.

On May 14, 1934, another meeting of the Board of Directors of the Plaintiff Corporation was held (R. 94). The committee had not completed its work and a general discussion was had before the Board on the various committee suggestions. Defendant Kremm discussed before the Board the new McKeown Act, (*i. e.*, federal legislation for relief of financially embarrassed corporations) with the view that the provisions of the Act might be applicable to the case of the Company's present condition if a Court could be shown a good operating lease agreement with some record of operation. Dr. Muchow again requested that the Syndicate lease be reinstated. The secretary advised the Board that the lease could not be reinstated with-

out ratification by the stockholders, and suggested that a new lease be made out to three individuals which lease could be later assigned. Dr. Muchow insisted that the time necessary for calling a meeting for ratification by stockholders would mean too much delay. The Board was unanimous in agreeing that the mill should again be put into operation, but that even if the Syndicate lease was reinstated, the Syndicate had no funds to start immediate operation. Defendant Kremm offered a motion to reinstate the lease with the Chain Syndicate. DuBuclet stated that as far as the Chain O'Mines was concerned, the Syndicate was a nonentity, being composed of a number of co-partners, many of whom were in dissension and litigation among themselves; that the Board of Directors had no guarantee that the Chain Syndicate as a group would assume the responsibility of the leased contract even if reinstated or would carry out such an agreement, and urged that the Board should not get into a complicated situation. Whereupon, Defendant Kremm amended the resolution and moved that the Syndicate lease of September 30, 1934, with amendments prepared by a committee, be reinstated subject to the acceptance of the original lessees or their assigns, without prejudice to either parties of the leased contract. This resolution was carried; Defendant Kremm voting aye and Director DuBuclet being the only "no".

The committee working on the amendments to the lease were to again meet.

(f) Filing of bankruptcy petition against Chain O'Mines.

Approximately at that time Defendant Kremm discussed with Potts, one of plaintiff's leading stockholders, the possibility of filing a petition for the Corporation under Section 77B of the Bankruptcy Act or other methods to save the plaintiff. Kremm suggested it. Potts agreed that if

it were possible to save the plaintiff, he was in favor of that—"any port in a storm" (R. 198).

About May 17, 1934 Kremm and Stevenson, the acting president of the plaintiff, wired $200.00 to Attorney Williams in Denver, Colorado to obtain a postponement of the sheriff's sale under the labor and power lien decree for a period of five days. Williams rejected the offer (R. 942). On or about May 18, 1934, Kremm called Dr. Muchow to his office and discussed with him the filing of a bankruptcy petition. He suggested that such petition be filed immediately, and asked Muchow to procure the three creditors for the petition (R. 269). Two former employees of the Chain O'Mines, *i. e.,* Miss Smith and Miss Jackson, who had claims against the Chain O'Mines were brought to the office. Miss Hart was also called to Kremm's office. He informed her that there wasn't any use in trying to help the Syndicate any further; there was one thing to do and that was to go into bankruptcy (R. 214).

Miss Smith and Miss Jackson endorsed their notes to employees of Kremm (Beatty and Kress) without any consideration passing.

On May 19, 1934, a petition in bankruptcy against the Chain O'Mines, Inc., was filed wherein Miss Kress, Mrs. Beatty, Pages J. Thibodeaux and Defendant Charles L. Schwerin signed as creditors (R. 209). [This petition was dismissed for want of prosecution on October 1, 1936, R. 211.]

During the day of May 18, 1934 Kremm attempted to arrange with a Chicago bonding office to have a bond furnished through its Denver agent in the event the ancillary bankruptcy proceedings in Denver took place.

On May 19, 1934, Dr. Muchow conferred with Kremm in his office and was informed that Kremm was going to Denver to make arrangements with regard to the labor and

power liens (R. 269). Kremm advanced Dr. Muchow money for that trip (R. 829).

(g) Kremm attempts to get best terms for Chain O'Mines from Lewison (Williams).

Kremm and Muchow came to Denver, Colorado. Kremm interviewed numerous attorneys in Denver, in an attempt to determine among other things, the possibility of ancillary proceedings in bankruptcy (R. 269).

After that Kremm and Muchow went to Central City, Colorado. Kremm conferred with Leroy Williams, the attorney for Edward Lewison (R. 269-270). Lewison had an interest of approximately $62,000.00 in the $97,000.00 judgment. Williams demanded at least $48,500 to sell his client's interest. The parties conferred at length. Kremm mentioned the petition in bankruptcy against Chain O'Mines (R. 930) and mentioned the filing of an ancillary petition in Denver as an inducement for settlement. In discussing matters which were advantageous to his side of the deal (R. 931) he said that a bankruptcy proceeding had been taken but they were temporarily holding it (R. 931). Discussion was had back and forth in arriving at terms for the purchase of the Lewison interest. An agreement subject to approval by Lewison was arrived at between Kremm and Williams as confirmed by the terms of a letter sent to Kremm by Williams dated May 21, 1934, Plaintiff's Exhibit 10 (R. 119-120).

In substance this letter provided that in the event Lewison and the Public Service Company of Colorado obtained a sheriff's certificate of purchase from the sale to be held May 22, 1934, Edward H. Lewison would make a contract to assign to Kremm all his interest for the sum of $48,500.00, payable $5,000.00 down and $5,000.00 bi-monthly thereafter with a provision for liquidated damages, and a further provision that in the case of failure to make any

payment after the first payment, there should be a grace period of thirty days during which the contract could be reinstated upon the payment of the sum of $5,000.00. This letter also provided that Kremm would cause no writ of error or review to be taken by the Plaintiff Corporation from the judgment and decree in favor of Lewison.

Kremm and Muchow returned to Chicago.

Kremm showed this letter to the Board of Directors prior to June 19, 1934 (R. 118).

(h) Directors' meeting of May 29, 1934.

On May 29, 1934, another meeting of the Board of Directors of the Plaintiff Corporation was held (R. 97) Muchow was present. At that meeting Stevenson acting as chairman, informed the Board of Directors of the pending bankruptcy proceedings against the Corporation, and after discussion, a resolution was passed authorizing Kremm to employ his counsel to represent the Corporation, and file an answer in the bankruptcy proceeding and to obtain a continuance. The Board also passed a resolution granting Dr. Muchow certain easements over the Chain O'Mines' properties. Kremm reported at length on his trip to Colorado and the negotiations entered into (with Williams) to effect a settlement of the labor situation on an installment payment plan basis. A subscription plan to give the stockholders and other investors of the Company an opportunity to assist in meeting the payments of this plan for the safe-guarding of their own interests and for the removal of a menace to the Company's existence created by the sheriff's sale in satisfaction of the Lewison judgment was presented for approval by the Board. Upon motion of DuBuclet, it was unanimously resolved that the Board of Directors of the Chain O'Mines approve the property recovery subscription plan and give every cooperative assistance possible and consistent with the position

of the Board. The Board was of the united opinion that if the investors of the Company failed to respond to this plan and save their own interests, then the Board would have exhausted its over-handicapped means and tenacious efforts to save the properties of the Company. Arrangements were made by the Board with regard to paying off certain labor claims by means of the operation of the mill to "run through" ore that had been mined under the Syndicate operation and had been lying awaiting the milling.

(i) Kremm attempts to raise cash from stockholders.

After this, various meetings were held by the individuals prior to June 19, 1934, in which tentative forms of a proposed agreement were discussed (R. 106). Certain conferences were held between Kremm and John S. Grimson, a stockholder and one of the members of the voting trust of the stockholders of Chain O'Mines, Inc., with regard to the matters of the Plaintiff Corporation needing funds to try to pay the labor lien, and various other pressing needs that would make it possible to continue operations of Chain O'Mines.

Prior to June 13, 1934, there had been conferences running over a period of time with the object in view of attempting to get various stockholders of Chain O'Mines to contribute moneys in an effort to lift the labor liens independent of any contract (R. 141). Grimson, on June 13, 1934, contributed the sum of $100.00 which was recognized as being very small compared to the amount needed. Grimson urged Kremm not to go ahead unless there was enough money in sight to start operations in addition to providing for the labor lien payments and with reasonable assurance that operations could be continued. Plaintiffs' Exhibit 17 (R. 141).

This attempt to raise money from the stockholders was unsuccessful. The total funds received on this subscription

plan were under $500.00. Accordingly the check was returned to Grimson. Plaintiffs' Exhibit 16 (R. 140).

During that time Kremm made trips out of Chicago accompanied by other officers, directors or stockholders, of plaintiff, in an attempt to raise money from stockholders. All these attempts were unsuccessful.

Shortly prior to June 19, 1934, Kremm, together with Stevenson and Dr. Muchow (R. 107) had prepared drafts of a suggested contract of installment payments. This suggested contract was also discussed with Grimson (R. 142). Kremm told Grimson that Seeley and Schwerin were to be his associates in connection with a contract that was to be finally executed (R. 142).

2. June 19, 1934 to Organization of Central City.

(a) Directors' meeting of June 19, 1934.

On June 19, 1934, there was a special meeting of the Board of Directors, Plaintiffs' Exhibit 8 (R. 100-106). Muchow was again present. At that meeting Kremm reported that he had caused an attorney to file an answer for the Plaintiff Corporation in the bankruptcy proceedings. The company had no funds to pay for the transfer fees of stock to which the Syndicate was entitled.

Kremm was heard on a proposal to the Chain O'Mines, Inc. He stated that his counsel had advised that after the sheriff's sale it was impossible to sell or lease the Company before redeeming and paying off the labor lien judgment, and that since insufficient funds had come in from the appeal to the stockholders to meet the first payment due June 22, 1934 (*i. e.*, under the Williams proposal for Lewison) to attorneys for the Lewison judgment, that he had a proposal to make. Kremm then outlined the plan for one, L. M. Seeley to assume the payment plan heretofore entered into with LeRoy Williams, whereby Seeley would

acquire the sheriff's deed under the Lewison judgment, and for a consideration of issuing certain stock in the Chain O'Mines, Inc., agrees to mortgage said properties for two million dollars in favor of Chain O'Mines as shown in full by Plaintiffs' Exhibit 9. After discussion, a resolution was adopted which is set out *in haec verba* at R. 104-105. The so-called contract agreement of June 19, 1934, is Plaintiffs' Exhibit 9 found at R. 108-116.

The Board also agreed to call a stockholders meeting for the formal ratification of this agreement when Lewison and his attorney Williams would have agreed to the assignment of the labor lien installment payment plan to L. M. Seeley or assigns.

When Seeley's name was discussed at the meeting, some of the directors wanted to know who he was. Kremm thereupon left the room and returned with an individual whom he introduced as L. M. Seeley, his associate (R. 107).

Stevenson had met Seeley a day or two previous to June 19th, after he had met Schwerin in Kremm's office. On that occasion Kremm introduced Seeley to him in a formal way as an associate in the proposed contract with Chain O'Mines (R. 202). The first that Stevenson knew that Seeley's name was to appear in the contract was at the last of the conferences that Stevenson had with Kremm on June 19, 1934, *prior* to submitting the contract to the meeting of the Board of Directors (R. 203).

The model of that contract, according to Stevenson, was the defaulted Chain Syndicate contract as modified to meet new conditions (R. 202).

After Seeley left the room, further discussion was had among the Board of Directors as to the form of the document. Kremm wanted to reduce the royalties, extend the time, reduce the interest rate, but the Board overruled that (R. 107). A request was made for further time to get

advice of counsel, but it was shown that the matter was very pressing and the deal would be off if the contract was not signed. A vote was taken and the contract was accepted (R. 107). That evening the document was signed by Plaintiff Corporation and apparently L. M. Seeley (R. 115).

After the signing of the document DuBuclet saw Kremm on June 21, 1934. At that time there was a discussion about the document. DuBuclet stated that the contract seemed very weak to him and that it could hardly be called a contract. He further stated to Kremm that it seemed to him nothing more than a gentleman's agreement, and Kremm agreed that it was just that and that "if we make good we will take care of the stockholders" (R. 118).

Kremm then wanted Dr. Muchow to go to Central City. He was glad to do it, and to help Kremm get the operation started in Colorado. An agreement was made between Kremm and Muchow that Muchow would go ahead, hire some men, get the operation ready, and that Kremm would follow shortly thereafter. Muchow in Central City got things in order by the time Kremm arrived about two or three weeks after this meeting. Kremm came to Denver on June 20th or 21st and met Williams. At that time Kremm showed Williams the document, Plaintiffs' Exhibit 9, and asked to have Lewison sign it. Williams agreed to make two changes in the original offer as stated by him in his letter of May 21st, 1934. Upon Kremm's representation that he could not get the plaintiff to agree to discontinue the writ of error or appeal that requirement was struck out. Also the requirement that Lewison was not obligated to turn over certain collateral, *i. e.*, stocks and bonds of the Chain O'Mines, Inc., was changed and these securities were turned in to the escrow along with the other papers. This escrow between Lewison and Seeley was Defendant's Exhibit 4, drawn up June 22, 1934 (R. 908-913).

(b) Kremm persuades Schwerin to invest in gold mine by loaning money.

Kremm had been acquainted with Schwerin since 1928. He had had various business dealings with him in 1934, and for sometime prior thereto in connection with various business matters. The first time that Kremm had any conversation with him with respect to the Chain O'Mines property was sometime in April of 1934. At that time Schwerin loaned Kremm a small amount of money (R. 951).

The first time Kremm had talked to Schwerin seriously about any plan to *operate* the gold mine properties was around June 15, 1934. At that time Kremm had told him of the failure of all the Corporation plans, and discussed the possibility of Schwerin investing money in a speculative business. Schwerin suggested several people as sources of money. Kremm investigated them. They did not materialize and Kremm returned to Schwerin. He discussed with him Plaintiff's Exhibit 10, Williams' letter of May 21, 1934. Kremm refused to accept $5,000 from Schwerin or on his behalf as a personal loan, but stated the investment had to be on a risk basis as risk money (R. 952).

Kremm showed Schwerin a draft of Plaintiffs' Exhibit 9 around June 17th. Kremm told Schwerin that he needed between $20,000 and $25,000 capital to operate the mine.

Kremm pointed out that $25,000 was needed to start the operation (R. 959). Kremm observed that some two millions of dollars had been spent on the Chain O'Mines properties, which had been used for development costs and which gave rise to questionable asset value. He pointed out to defendant Schwerin that bidders at the sheriff's sale held on May 22, 1934, had placed a value of $100,000 on 55 of the 1100 claims owned by Chain O'Mines, Incorporated, by bidding that amount for the 55 claims, which were

the most valuable claims. He mentioned that a complete mill was located on these valuable claims (R. 959). He expressed the opinion that the most valuable right was the right to operate the property without harassment from creditors. A contract for the acquisition of the sheriff's certificates which had been issued would carry with it the right to operate the 55 claims and the mill for a sufficient period to determine if the property actually had merit. If the property had merit, he estimated that the purchase of the certificates could be paid out of proceeds from mining operations. If the property produced returns which were adequate to pay the cost of acquiring the sheriff's certificates, the operating corporation would then be obligated to give a $2,000,000.00 mortgage on the property acquired. This was of no concern to Kremm because the amounts to be paid under the mortgage amounted to nothing more than the fixing over 25 years of a reasonable royalty (R. 960). (Insertion ours: Mining operations frequently pay substantial royalties for long periods of years, and that it is common practice to capitalize such royalties on an annual percentage basis.) He mentioned further that the plan involved some hazard, but that the hazards were not disproportionate to the possibilities for tremendous profit.

Schwerin agreed to cooperate with Kremm in raising the capital which Kremm wanted to start the operation. Because of the delay and uncertainty involved under the then recently enacted Securities Exchange Act in attempting to sell stock, an initial $23,000.00 was raised in the form of loans secured by ore warrants (R. 965). These ore warrants were made payable in nine months from the date of execution and delivery, and constituted a *prior claim* on ore to be extracted from the operation. Such security for repayment was based on the belief of Kremm that potential returns from the mining operation had been accurately stated by Dr. Muchow. Had that been true, there

would have been no difficulty in paying these ore warrants which never were liquidated.

(c) Kremm and Seeley go to Denver and confer with owners of Sheriff's Certificates.

When Kremm and Seeley came to Denver to meet Williams on June 22, 1934, Kremm informed Williams that the June 19, 1934 (Plaintiffs' Exhibit 9) document spoke for itself, that Seeley had with him a check for $5,000.00, that he did not know yet where the remainder of the money was coming from, but that they were ready to go ahead with the purchase as outlined in the memorandum agreement. Williams at first refused to sign the agreement, *i. e.*, Plaintiffs' Exhibit 9, stating among other things that he did not intend to join in any agreement with which Chain O'Mines was a party, that then Williams signed the escrow agreement found as Defendant's Exhibit 4 on June 23, 1934 (R. 954).

Around June 22, 1934, Kremm, Muchow and Seeley met with officials of the Public Service Company of Colorado, the owner of approximately 32/97ths of the lien judgment. He tried to negotiate for the purchase of the Public Service Company's interest in the sheriff's certificate, showing Seeley's $5,000.00 check. They replied that they didn't wish to have any agreement in which the Chain O'Mines or its officers were involved, except to sell to them for cash; that they had some obligation to Mr. Williams to work in concert with him but they would sell their interest in the purchase certificate only for cash. The Public Service Company never signed this agreement of June 19, 1934. They told Kremm to raise twenty to twenty-five thousand dollars for working capital for the operation and then come back to talk with them further (R. 956).

(d) Kremm returns to Chicago. Attempts to raise additional $20,000. Stockholders and corporation fail.

Kremm returned to Chicago about June 26, 1934, and met with Stevenson, Dr. Muchow and Grimson. He reported what he had done, the difficulties that he had with the Public Service Company, and that the real problem now was in raising the rest of the money over the $5,000.00 within the next 25 or 30 days; that if he could raise sufficient capital to begin working operations that he could arrive at some agreement with the Public Service Company (R. 956).

On June 27, 1934, Williams was paid the $5,000.00 by L. M. Seeley (R. 914).

Kremm during the next several weeks interviewed various individuals including stockholders of the Chain O'Mines, Inc., in attempts to obtain funds for the gold mining operations to be conducted by the corporation to be formed.

Dr. Muchow in preparing the so-called Property Recovery Fund had estimated for the sum of $13,000.00 as working capital for the resumption of the operations of the property. Kremm at all times had insisted that between $20,000.00 and $25,000.00 was necessary. In working upon Muchow's Property Recovery Fund in an attempt to collect $13,000.00, Kremm solicited subscriptions from the stockholders. He called upon the leading stockholders and various outside people under an arrangement that if a definite amount of money were not received within a fixed period he would return the subscriptions. Under that arrangement he had collected less than $500.00. Kremm was not

furnished with any money by the Chain O'Mines or the Board of Directors or officers (R. 946, 948).

This is the background of the "contract" relied on by petitioners as proving the fraud, with these practically undisputed facts established by the record the Circuit Court of Appeals came to the conclusion that there was no conspiracy to defraud the petitioners.

We submit that the decision of the Circuit Court of Appeals *was* and *is* correct.

REPLY TO PETITIONERS' ARGUMENT.

Alleged Misconception of Trial Court Decree.

1. At pages 18 to 27 petitioners argue that the Circuit Court of Appeals misconceived the decree of the trial Court. They attempt to prove this contention by referring to the use by the Circuit Court of Appeals of the words "temporary phase," "refinancing project," "property would be restored to it upon the floating of this mortgage."

But the word "float" is not a word of art. It was not used by the Circuit Court of Appeals in any technical or "artistic" sense as claimed by the petitioners. This is also true of the words "temporary phase" or "refinancing project."

Further, examination of the opinion of the Circuit Court of Appeals and of the context in which these words were used indicates that that Court *correctly* interpreted the intention of the parties for the "contract" was nothing more than a temporary phase, that is to say, an attempt to hold the lien foreclosure in *status quo* pending the raising of additional money, which meant that the contract involved a refinancing project.

The parties had considered prior to that time the question of the Chain O'Mines taking its property, provided sufficient money could be realized to pay for the pressing liens. But no money could be raised by the Chain O'Mines or its stockholders *i. e.*, the property could not be restored to the Chain O'Mines because there was no proper refinancing.

But assuming for the sake of argument, that the Circuit Court of Appeal's misconceived the decree as claimed

by the petitioners, how would that *tend* to prove FRAUD? It would simply tend to show that the Chain O'Mines at one time was entitled to different contractual rights than that considered by the Circuit Court of Appeals; but this would not constitute a showing of any fraud.

We must also recognize that the so-called contract of June 19, 1934, was extremely vague and general in its terms. There was no date set for its execution. It was *never* signed by the Public Service Company of Colorado. There is even some question as to whether or not *Lewison* was ever bound by the provisions of the contract.

In addition, Chain O'Mines, its stockholders, and its directors, treated the contract as very "weak," for they all recognized that in essence it was merely an *attempt* to obtain money. The contract was never considered as a certain guarantee of the financial security of the Chain O'Mines. It was recognized that the *only* way the Chain O'Mines could profit or the only way that it could be rescued from the financial morass would be *if* the gold mining properties could be operated at a profit. The fact *is* that the properties were always operated at a financial loss. The parties never went through with the contract. The Chain O'Mines abandoned the contract and gave it up as lost in 1934.

The fact that nothing was done about filing suit until 1937, approximately three years later corroborates our contentions.

2. At pages 23-24, petitioners state that they don't know when the conspiracy to defraud began and that "no outsider knows." Nevertheless, the petitioners, in their complaint, seemed to know the time when the conspiracy began, and the trial court found that the conspiracy began on the specific date of May 8, 1934 (R. 1054). It does make a difference in the law suit when the petitioners contend that the conspiracy began because, by

rule of law, if the conspiracy did not exist on May 8, 1934, it could not exist *ex post facto.*

In re Prima Brewing Co., 98 Fed. (2nd) 952, 965; *Sobin* v. *Frederick,* 236 Mich. 501, 211 N. W. 71, at 74.

3. At page 25 petitioners attempt to criticise certain statements of fact made by the Circuit Court of Appeals. Petitioners are in error.

(a) Petitioners err when they state that the mortgage had been eliminated by the decree in the foreclosure of the labor and power liens, because the decree in that case provided simply that the said $300,000 mortgage was *junior* and *subordinate* to the said liens (See R. 894). The mortgage was also subordinated to various other judgments (See R. 894, 873, 875).

(b) Petitioners err when they say that the labor and power liens were pressing only in accordance with the contract in which defendants had agreed to acquire them. The labor and power liens were pressing from the time the suit to foreclose them was begun. Petitioners fail to recognize that the meaning of the Circuit Court of Appeals was the emphasis upon the "*pressing,*" regardless whether it was in accordance with the contract or by virtue of the decree of foreclosure. The fact is that $97,000 in cash was demanded by the lien holders, and unless the respondents had provided cash required by the terms of the contract with the lien holders all of the property would *again* be forfeited to such lien holders. The history of the legal plans and devices used to pay the $5,000 a month clearly illustrates the desperate nature of the finances of the respondents for, in order to meet the $5,000, it was necessary to make repeated agreements for extensions, to make repeated agreements for payment in installments, to borrow money at the bank, to assign ore warrants, to exchange checks and various other measures

made necessary by the lack of moneys. Similarly the moneys needed to pay for the operating costs had to be raised in this desperate fashion.

(c) Petitioners err when they state that the mining operations were profitable. The record shows that the operations under Kremm, Kollie, the Lundorff Bicknell of Cleveland, the Central City Company and the United Gilpin Corporation—all of these operations failed to make a profit. Kremm and Kollie were not paid any salary. The Lundorff Bicknell Company could not produce sufficient tonnage per month to enable the properties to be operated at a profit. The Central City Company operated at a "paper loss." United Gilpin Corporation had a "paper profit" for two years, but the last month of operation indicated a "paper loss." The record discloses that the "paper profit" of the United Gilpin Corporation was typical of gold-mining profits because it was "a paper profit" only because there was no proper deductions for taxes, no proper deductions for salary, depletion, depreciation and the like. There was no provision for interest on capital advancements. With strict accounting expenditure there would not even have been the existence of a "paper profit."

(d) Petitioners err in stating that the stockholders could not "stand by." When Kremm had first tried to raise money from the stockholders in order to meet the terms proposed by Lewison or his attorney he could not even raise the sum of $1,000. The minutes of the board of directors meeting of the Chain O'Mines indicated that they could not even reimburse the corporate president for moneys paid out of pocket (R. 92).

The fact is that the stockholders of Chain O'Mines had then already learned by bitter experience what the respondents to their financial detriment were to similarly experience.

A reading of the minutes of the Board of Directors' meetings graphically illustrates the essential fact strongly relied on by the Circuit Court of Appeals: Chain O'Mines was financially wrecked *before* the respondents were approached. See Plaintiffs' Exhibits 4 (R. 87), 5 (R. 90), 6 (R. 94), 7 (R. 97), 8 (R. 101), 11 (R. 121), 12 (R. 124), 13 (R. 126).

Alleged Misconstruction of Illinois Law.

This is pp. 24-32 of the brief.

1. Apparently petitioners are urging first, that the Circuit Court of Appeals failed to follow the Illinois law with regard to reimbursement upon restitution; second, failed to follow the Illinois law concerning the nature of evidence necessary to prove the existence of a constructive trust, and, third, failed to follow the substantive provisions of Illinois law with regard to the various kinds of fraud. We say that the reading of the opinion of the Circuit Court of Appeals and the cases cited therein conclusively shows that the Court not only felt bound to follow the Illinois decisions but also cited such decisions in its opinion and applied such rules of the Illinois law therein formulated to the facts in the case before them (R. 1139-1141).

2. The petitioners under this heading are simply trying to argue that the Circuit Court of Appeals erred in applying the applicable rules of law to the facts. This is *not* the same as saying that the Circuit Court of Appeals has decided a question of local law in a way in conflict with applicable local decisions. The Circuit Court of Appeals purported to follow the Illinois law. It applied the Illinois law in finding there was no fraud. It followed the Illinois cases in holding that in any event, the respondents were entitled to any credits for moneys advanced for the benefit of the "so-called *cestui.*"

3. At page 30 petitioners apparently are attempting to argue that the Illinois law is that in order to establish a constructive trust the rule that proof must be clear and convincing applies only to where the proof offered is "parole" testimony. Apparently petitioners assume that parole means "oral." This conception, of course, is erroneous, for parole means *both* "oral" and "written."

N. W. Co. v. *Sloan,* 232 Ill. App. 266, 269;
Kine v. *Tobyhenna Ice Co.,* 240 Pa. 61, 87 Atl. 278, 279;
Coleman v. *St. Paul Lumber Co.,* 110 Wash. 259, 188 Pac. 532, 537.

In our case, of course, the evidence *was* both oral and written.

4. In addition petitioners err in failing to recognize that the rule requiring such convincing proof in cases of attempts to impose a constructive trust applies to *all* kinds of proof, both oral and written.

Additional Illinois authorities which clearly support the statement of the rule given by the Circuit Court of Appeals and where the Illinois Supreme Court reverses findings of fact made by the Chancellor below on the ground that the facts fail to establish such *unmistakable* proof of constructive trust within the meaning of this rule are as follows:

Johnson v. *Lane,* 369 Ill. 135, 148, 149;
Sharp v. *Bradshaw,* 367 Ill. 526, 527, 528;
Hogg v. *Eckhardt,* 342 Ill. 246, 254, 255.

5. With regard to the case of *Morris* v. *Flenner,* 25 Fed. (2d) 211, cited by petitioners at pages 31-32, petitioners fail to recognize that the question there involved was a question of *fraudulent conveyance, i.e.,* conveyance made with intent to hinder or defraud creditors. Although the Court does not refer to the Statute in its opinion,

nevertheless, the decision is under the provisions of the Illinois statute relating to fraudulent conveyances.

See:

Ill. Rev. Stat. 1939, Chap. 59, Sect. 4, p. 1726.

The question of fraudulent conveyance does not arise in our case.

6. At page 32 petitioners for the *first* time suggest that the respondents are bound to "account for and pay over the difference of the consideration over and above the liens discharged." (This point was not raised in the petition for Certiorari.)

The facts indicate that the value of the properties at a million and a half dollars over the liens was an optimistic exaggeration. When the property was sold for $97,000 to satisfy labor and power liens, the lien claimants were substantially the only bidders at such sale, and they obtained the property by turning in their liens for it. The stockholders for the Chain O'Mines refused to advance any cash.

The Chain O'Mines lost its property because it was financially destroyed, prior to the entry of the respondents into the operations. The respondents practised no fraud upon it. The respondents tried to operate the property as best they could, continually advancing additional money. In advancing such additional sums of money they tried to secure such advances by taking security interests. They are entitled to keep the security interests. The petitioners have never offered to reimburse the respondents for the moneys advanced by them. The record conclusively discloses that they never will be able to make such offer of reimbursement.

Alleged Conflict in Decisions.

7. At page 32 petitioners refer to a conflict with *In Re Country Club Corp.*, 91 Fed (2d) 13) another decision by the same Court on the same question. But there is no conflict. The *Country Club* case was a bankruptcy case in which the master's findings were apparently approved by the referee, and then approved by the District Court. The facts there were apparently *without* any dispute. The decision of the Court on the facts before it was correct. The Court may have been in error in citing a "law case" as its reason for its refusal to disturb the finding of fact in a bankruptcy case, but the decisions we have cited, *supra*, in our brief indicate that the Circuit Court of Appeals in the instant case followed the correct rule of law with regard to reviewing evidence on an equity appeal.

The Alleged Fraud.

At pages 33-34 the petitioners refer to the case of *People* v. *Small*, 319 Ill. 437. But petitioners carefully omit the leading Illinois case, *Tribune Co.* v. *Thompson*, where considering the question of proving a "conspiracy to defraud" by circumstantial evidence, the Supreme Court of Illinois recognized that although a conspiracy may be proved by indirect or circumstantial evidence, it says:

> "Such evidence must be clear and convincing and if the facts and circumstances relied upon are *as consistent* with innocence as with guilt, it is the duty of the Court to find that a conspiracy has *not* been proved and to enter a decree dismissing the bill for want of equity (citing cases)," 342 Ill. at page 529. (Italics ours.)

To the same effect see:

Fernandina Co. v. *Peters,* 18 Fed. (2d) 277, 278;
Hensch v. *Ormond,* 1 Fed. (2d) 206, at 208.

It is well settled law that if the facts and circumstances relied upon to show conspiracy by circumstantial evidence are as consistent with innocence as with guilt, it is the duty of the Court to find that a conspiracy has *not* been proved. The evidence must do more than raise a suspicion! It *must* lead to belief.

Nissen v. *Andres,* 178 Okla. 469, 43 Pac. (2d) 47, at 51;
Ballantine v. *Cummings,* 220 Pa. 621, 70 Atl. 546, at 550;
Nester Johnson v. *Goldblatt,* 265 Ill. App. 188, at 201;
Henrici Co. v. *Alexander,* 198 Ill. App. 568, at 574.

The plaintiff's evidence does not even raise a suspicion of fraud. At the very least, it was not clear and convincing. As a matter of Illinois law the Circuit Court of Appeals did exactly what the Illinois Supreme Court would have done under the same facts and circumstances, namely, rule that the decree should be reversed and the cause remanded with instructions to dismiss the complaint.

Review of Evidence.

The evidence in the main is not conflicting, contrary to petitioners' statement on page 34. The question was one of drawing inferences as to the motive or motives of the defendants. The opinion of the Circuit Court of Appeals indicates that the Court analyzed the voluminous evidence for itself; it carefully weighed and considered the evidence and the reasonable inferences that could be drawn there-

from. It came to the conclusion that the trial judge had erred in drawing the inference that fraud had motivated respondent's conduct and accordingly it reversed his decree. That conclusion was and is correct.

The 2 patent cases cited by petitioners at page 35 are not in point. Prior to discussing them, we briefly refer to *Corona Card Tire Co.* v. *Dovan Chemical Corp.*, 276 U. S. 358, a patent case, where this Court held that even though the trial court made a finding for one party on conflicting evidence, yet, where the Circuit Court of Appeals has reversed such finding, the Supreme Court in later reviewing the facts is *not* bound by the ordinary rule in patent cases that findings of fact by the trial court based upon conflicting evidence are not assailable (276 U. S. at 375).

In the *Adamson* case, the Circuit Court of Appeals had reversed the trial court decree on the basis of a *fixed rule of law.* This Court finding *contrary* to this fixed rule of law, then considered the facts on the basis of the rule cited and quoted by the petitioners.

In the *Davis* case the Master and the District Court had made findings of fact based upon conflicting evidence, *i.e.*, the "two-court rule." The appeal was directly to the United States Supreme Court from the United States District Court. In the case at bar the evidence in the main was undisputed, but the inferences to be drawn therefrom may have differed under the decision of this court. The Circuit Court of Appeals was under the law authorized and obligated to examine both the law and the facts and to consider the appeal *de novo.*

Contrast the facts in these two patent cases with the facts in our record. The "will of the wisp" profit in gold mining ventures has lead many business men to financial ruin.

An analogous "gold mining investment" case where the court held that investment in "gold mines" did not constitute a "fraud" is *Bowyer* v. *Boss Tweed Clipper Gold Mines*, 195 Wash. 25, 79 Pac. (2nd) 713. There, as in this case the parties who had suffered a financial loss in *their* investment sought to hold other investors liable for such loss. There, as in this case the reviewing court set aside the chancellor's findings, holding that defendants were *not* guilty of a conspiracy to obtain possession of a gold mine by "fraud". The facts are substantially similar to the case at bar. *This* case is a precedent. It is in favor of the respondents.

See also a reversal of the chancellor's finding in the "nature" of a "conspiracy"—*In Re Prima Brewing Co.*, 98 Fed. (2nd) 952, 964, 965 (C. C. A. 7, cert. den. in 305 U. S. 658).

CONCLUSION.

Wherefore, United Gilpin Corporation, a corporation, *et al.*, respondents, respectfully pray that the petition for certiorari herein be denied.

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